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IN THE

Supreme Court of the United States

ESTATE OF C. DELORES TUCKER, BY AND THROUGH WILLIAM TUCKER AS PERSONAL REPRESENTATIVE; AND WILLIAM TUCKER, INDIVIDUALLY, PETITIONERS

v.

INTERSCOPE RECORDS, INC.; DEATH ROW RECORDS, INC.; CHARLES B. ORTNER, PAUL, HASTINGS, JANOFSKY & WALKER, LLP; DAVID KENNER; GEOFFREY THOMAS; JACK PALADINO; AND PAUL PALADINO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the court of appeals nullified substantive California law on the proof necessary to show malice for claims of malicious prosecution, creating unprincipled federal common law and subverting the policies of comity and federalism enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 65(1938)?

2. Have the federal courts below undermined the summary judgment procedure by deciding for themselves—instead of letting a jury determine—-the crucial fact question of whether the respondents acted with a malicious state of mind when they brought lawsuits against the petitioners with knowledge that their claims lacked probable cause?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit in the consolidated appeals of *Estate of C. Dolores Tucker et al. v. Interscope Records, Inc., et al.*, C.A. No. 05-56045, and *Estate of C. Dolores Tucker et al. v. David Kenner et al., et al.*, C.A. No. 06-55376, decided February 8, 2008, reported at 515 F.3d 1019(9th Cir. 2008), affirming in part and reversing in part the grant of summary judgment by the District Court on the issue of malice, is set forth in the Appendix hereto(App. 1-64).

The unpublished memorandum decision of the District Court for the Central District of California in *Estate of C. Dolores Tucker et al. v. David Kenner et al., et al.*, Docket No. CV99-06129 RMT(CTx), filed February 24, 2006, establishing as a matter of law that the petitioners cannot show malice as to the respondent David Kenner, is set forth in the Appendix hereto(App. 65-71).

The unpublished memorandum decision of the District Court for the Central District of California in *Estate of C. Dolores Tucker et al. v. Interscope Records, Inc., et al.*, Docket No. CV99-03679 RMT(CTx), filed June 27, 2005, establishing as a matter of law that the petitioners cannot show malice as to the respondents Interscope Records, Inc., Charles Ortner, Death Row Records and the law firm of Hastings, Janofsky & Walker LLP, is set forth in the Appendix hereto(App. 72-90).

The unpublished memorandum decision of the District Court for the Central District of California in

Estate of C. Dolores Tucker et al. v. David Kenner et al., et al., Docket No. CV99-06129 RMT(CTx), filed June 10, 2005, establishing as a matter of law that the petitioners cannot show malice as to the respondent Geoffrey Thomas, is set forth in the Appendix hereto(App. 91-109).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in the consolidated appeals of *Estate of C. Dolores Tucker et al. v. Interscope Records, Inc., et al.*, C.A. No. 05-56045, and *Estate of C. Dolores Tucker et al. v. David Kenner et al., et al.*, C.A. No. 06-55376, filed March 19, 2008, denying the petitioners' petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 110-111).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part the orders of the District Court granting the respondents' motions for summary judgment on the issue of malice was decided on February 8, 2008; and its further order denying the petitioners' timely filed petition for rehearing *en banc* was filed and decided on March 19, 2008 (App. 1-64;110-111).

This petition for writ of certiorari is filed within ninety (90) days of March 19, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article VI, Paragraph 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1332(a)(1):

> **(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> **(1)** citizens of different States;...

Fed. R. Civ. P. 56(c) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
>
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> ....
>
> **(e)(2). Affidavits; Further Testimony.**
>
> ....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is

properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

Throughout the 1970's, C. Delores Tucker ("Tucker") was a person of prominence in the African-American community, in the Democratic Party and in the Commonwealth of Pennsylvania (App. 32). She was the first woman and the first African-American to serve as Secretary of State for Pennsylvania; she served as Chair of the Democratic National Committee Black Caucus; and she was the first African-American president of the National Federation of Democratic Women(App. 32). In 1993, Tucker was sixty-six (66) years old and the Chair of the National Political Congress of Black Women ("the NPC")(App. 32;34-35).

Responding to the pleas of famous African-American musical performers such as Ms. Dionne Warwick and Ms. Melba Moore that something be done about so-called gangsta rap and "what's going on Hollywood about our young people calling us whores and bitches and disrespecting and denigrating African-American women," Tucker became aware in 1993 that this kind of music was being sold to children and that it denigrated African-American women generally(App. 32;34-35). So informed, Tucker "put [her] marching

shoes back on that [she] marched with Dr. Martin Luther King hand in hand in Selma"(App. 35).

In her effort to expose gangsta rap music as harmful to African-American women, to black culture and to African-American families generally, Tucker as the Chair of the NPC enlisted Warwick, Moore and others to form an Entertainment Commission whose mission statement was to (1) promote equal opportunities for black artists and black decision makers in the music industry; (2) mobilize black artists in the industry to address as role models and spokespersons emerging health and education issues in the African-American community; and (3) develop strategies to counteract gangsta rap so that African-American youth had alternative positive role models and images which preserve the dignity and heritage of black culture(App. 35-36).

Tucker also demonstrated outside of a Tower Records store to protest its sale of gangsta rap music to minors(App. 36). A wide range of national political leaders supported Tucker in her efforts, including Tipper Gore, Bob Dole and Senator Sam Nunn(App. 36). She testified before the Federal Communications Commission and before Congress on the harm done to African-American youth and their families by gangsta rap(App. 36). She even attended a Times Warner stockholders' meeting where she offered the music corporation's executives $100 if they would read gangsta rap aloud to the meeting(App. 36). "In short, Tucker using the skill and smarts of a woman knowledgeable about political endeavors and media responses, took advantages of the democratic processes available to aroused citizens, and made

herself a terrific nuisance to the principal producer of gangsta rap, Death Row [Records, Inc.]"("Death Row")(App. 36).

Death Row, founded in 1991, had revenues in 2002 of $22 million but it is currently in bankruptcy(App. 33). Its co-founder Suge Knight ("Knight") was Death Row's CEO during the period between 1993 and 1998 when the relevant events in this case took place(App. 33). Death Row signed some of hip-hop's biggest stars including Tupac Shakur and it dominated the gangsta rap recording industry in the mid-1990's(App. 33). The company came to represent the West Coast rap movement in the emerging East Coast-West Coast rap rivalry which eventually led to the murders of Tupac Shakur in 1996 and Shakur's East Coast rival rapper, Biggie Smalls, in 1997(App. 33). During all of this time, Death Row distributed its gangsta rap music through Interscope Records, Inc. ("Interscope")(App. 33).

In the face of Tucker's persuasive movement against the dissemination of gangsta rap music, Death Row's Knight and its attorney David E. Kenner ("Kenner") met with Tucker and others on July 7, 1995, at NPC's biennial convention in Seattle(App. 37). They discussed the formation of a a new distribution company, owned by blacks, which would distribute music produced by Death Row *if* Knight eliminated gangsta rap from the kinds of music which Death Row produced(App. 37).

One month later, on August 7, 1995, Tucker and others drafted a letter for Knight's signature, one which memorialized their earlier meeting of July 7,

1995(App. 37). The letter promised that Death Row would stop producing "misogynist, obscene and pornographic" music and Tucker's organization NPC would then negotiate a contract with Time Warner Inc. for the production and distribution of Death Row's music(App. 37). A Time Warner's executive was present the next day to meet with Knight about this proposed production and distribution deal(App. 37). Death Row's Knight, however, failed to attend the meeting(App. 37).

On August 9, 1995, Death Row's attorney Kenner drafted a letter from himself and Knight to Tucker's colleague, Ms. Warwick, rejecting the draft letter, affirming his decision to stand by his music and his musicians and claiming that Tucker had either misunderstood what he had said at their meeting of July 7, 1995, or had misrepresented what he had said(App. 37-38). They also rejected any idea of collaborating directly with Time Warner for the production or distribution of Death Row's music(App. 38).

After Death Row's Kenner conferred with Interscope's attorney, Charles B. Ortner("Ortner"), Interscope through Ortner filed a civil action against Tucker in the federal district court for the Central District of California on August 15, 1995, alleging that Tucker for her own personal and financial gain conspired with unknown others to destroy Interscope by extortion and threats(App. 38). It first claimed that the contractual relationship between it and Death Row "has been disrupted" by Tucker; it sought a preliminary and permanent injunction against these act(App. 38). Another claim was for injunctive relief prohibiting

Tucker from seeking to induce Time Warner and its affiliate with whom Interscope had a relationship (Atlantic Ventures) from breaching their fiduciary relationship to Interscope(App. 38). Finally, it claimed that injunctive relief was necessary in order to stop Tucker from engaging in unfair business practices and unfair competition(App. 38).

According to Interscope, Tucker's conduct irreparably harmed its interests and deprived it of property rights; it sought an award of compensatory, exemplary and punitive damages together with its attorney's fees(App. 38). The complaint was signed by Ortner as Interscope's attorney and bore the firm name of Paul, Hastings, Janofsky & Walker, LLP("Paul Hastings")(App. 38).

Two days later, on August 17, 1995, Death Row's attorney Kenner filed a second civil action against Tucker, NPC, Time Warner, Time Warner Music Group and certain Time Warner executives on behalf of Death Row in the federal district court for the Central District of California(App. 39). Death Row alleged multiple violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-68, as well as various other violations of federal and state laws(App. 39). It claimed that all of the defendants conspired to enrich themselves, beginning in July of 1994 with a "smear campaign" against Death Row for political reasons, a campaign with a hidden, ulterior motive to replace Interscope with another company as Death Row's music distributor(App. 39).

Death Row claimed that Tucker's public efforts to expose gangsta rap music as harmful to African-

American women, to black culture and to African-American families was a violation of RICO and hid her actual attempt to establish for herself a distribution company for Death Row's records(App. 39-40). Predicate acts were alleged to be extortion, mail fraud, wire fraud and interference with interstate commerce, all acts allegedly carried on by Tucker in unspecified ways through"the wires, radio, or television communications" causing actual but unknown damage to Death Row(App. 40). Several other claims by Death Row followed: conspiracy, interference with advantageous business relationships and contractual relationships, extortion, "unfair business practices," and abuse of process(App. 40-41). It sought injunctive relief as well as exemplary, compensatory and punitive damages(App. 41).

In the immediate aftermath of these two lawsuits against Tucker, Death Row and its CEO Knight made clear their hatred for Tucker in a record industry publication, diminishing her role in the civil rights movement and in the black women's movement and calling for her elimination by drawing a red line through her name in a list of civil rights heroes(App. 41). Moreover, in two recorded songs produced by Death Row, distributed by Interscope and performed by Tupac Shakur during this time, Death Row's Shakur identified Tucker by name in the songs and repeatedly called her a series of street names ("muthafucka.," "bitch" and "lame soul") denigrating her efforts on behalf of black culture, black women and African-American families to develop positive role models opposed to gangsta rap(App.42-43). Death Row and its attorneys also engaged in aggressive, unnecessary

document discovery and, as a form of harassment fueled by their rancor and ill will, needlessly deposed Tucker *for eleven days* over the course of two years with nothing to show for it(App. 41-42).

These two suits by Death Row and Interscope against Tucker in the district court were eventually set down for trial on October 27, 1998(App. 43). However, on June 1, 1998, Death Row filed a notice to dismiss its action claiming that Death Row and Interscope had severed its relationship rendering injunctive relief inappropriate, and that both Tucker and NPC lacked sufficient funds to pay any damage award(App. 43). Interscope also moved to dismiss its action against Tucker(App. 43). On June 18, 1998, the district court granted the motions(App. 43).

Within months of this dismissal, Tucker and her husband William Tucker("the petitioners") brought this action in the federal district court for the Eastern District of Pennsylvania positing jurisdiction on diversity of citizenship and alleging that the respondents Interscope, Death Row, Interscope's attorney Ortner, and Paul Hastings ("the *Interscope* respondents") had maliciously prosecuted civil proceedings against them, had abused civil process in doing so, had intentionally inflicted emotional harm, had engaged in civil conspiracy and had committed RICO violations (App.11). The case was then transferred to the district court for the Central District Court of California(App. 11). All but the petitioners' malicious prosecution and loss of consortium claims were withdrawn(App. 11).

The petitioners also brought another civil action in the district court for the Central District Court of California against Death Row's attorneys and respondents David E. Kenner and Geoffrey Thomas, among others("the *Kenner* respondents")(App. 11). The *Kenner* complaint similarly raised claims for malicious prosecution and loss of consortium in addition to abuse of process, slander and negligent and intentional infliction of emotional distress(App.11). As with the petitioners' *Interscope* litigation, all but their malicious prosecution and loss of consortium claims were withdrawn(App. 11).

After some discovery, both the *Interscope* and *Kenner* respondents moved for summary judgment in their favor based upon, among other things, an insufficient showing of malice(App. 11-12). The district court granted the motion because of a lack of evidence of damages or of a loss of consortium and because all the other issues were moot(App. 12). The court of appeals reversed and remanded, instructing the district court to consider the remaining grounds for summary judgment, including a lack of malice. *Tucker v. Kenner*, 85 Fed. Appx. 610(9th Cir. 2004).

Upon remand in *Tucker v. Interscope*, the district court, Takasugi, J., ruled *inter alia* that while there were triable issues of fact to be determined concerning the probable cause Interscope, Ortner and Paul Hastings had to pursue some of their claims against Tucker, the petitioners had "failed to produce any evidence to show that the *Interscope* defendants acted with malice" in filing their underlying lawsuits and that the loss of consortium claim was insufficiently supported(App. 12-13;83-84). It therefore dismissed the

petitioners' claims for malicious prosecution and for loss of consortium(App. 13;84-86).

In *Tucker v. Kenner*, the district court, Takasugi, J., ruled *inter alia* that while there were unresolved factual issues whether the respondent Thomas as Death Row's attorney had probable cause to pursue some of the claims against Tucker, the petitioners had failed to adduce any evidence of malice sufficient to support their malicious prosecution claim(App. 13-14;101-102). Because this ruling was directed to the respondent Thomas only, the respondent Kenner moved for and obtained a subsequent ruling clarifying the earlier decision concerning the respondent Thomas so that it applied to the respondent Kenner as well(App. 14;65-71).

In the meantime, Tucker passed away at the age of 75 in 2005 and in an order dated January 27, 2006, the district court granted her husband's motion to substitute himself as the personal representative of her estate as a party-plaintiff(App. 43;56-57). The petitioners, i.e., the estate of Tucker as represented by her husband William Tucker and William Tucker, individually("the petitioners") appealed from these rulings. Both the *Interscope* and the *Kenner* actions were consolidated for the purposes of the petitioners' appeal(App. 2). On February 8, 2008, a majority of the court of appeals rendered its decision in these consolidated appeals affirming in part and vacating in part the district judge's rulings(App. 1-64).

The majority concluded that except for the abuse of process claim filed by the respondent Kenner, the petitioners' evidence "did not create a triable issue of

fact whether the *Interscope* or *Kenner* Defendants acted with malice in pursuing" their respective actions against Tucker(App. 20). Separately considering the parties in the underlying actions against Tucker (i.e., Death Row and Interscope) from their attorneys (i.e., Ortner, Kenner, Thomas and Paul Hastings) for purposes of analyzing evidence of malice, the majority first rejected the notion that a lack of probable cause to bring the underlying lawsuits was probative of malice(App. 21-22). It reasoned that only evidence of the party respondents' subjective intent in filing the lawsuits was probative of malice and that a lack of probable cause for the lawsuit does not prove the subjective intent of the respondents(App. 21).

Nor did the majority think that Death Row's threats in an industry publication to eliminate Tucker or its public denigration of Tucker in their songs by Shakur *after the underlying lawsuits were filed* was probative of its malice in bringing its action against Tucker because

> such conduct occurred months after the suits were initiated and is simply not probative of either party's subjective intent in filing the underlying litigation. Placing an ad to promote Snoop Dog's latest album, or calling out an individual in lyrics----even if done so in a shocking and degrading way----does not present any of the "hallmark[s] of a *lawsuit* brought for an improper purpose." See *Sierra Club Found. v. Graham*, 72 Cal. App.4th 1135, 1157 (Cal. App. 1999). Nor does *Zamos* [*v. Stroud*, 32 Cal. 4th 958(Cal. 2004)] address this question. On this record, no California authority supports, nor

> could any reasonable finder of fact infer, that this post-filing conduct was probative of why the parties filed *Interscope v. Tucker* and *Death Rowv. Tucker.*

(App. 23)(emphasis in original)(footnote omitted). For the same reasons, the majority refused to consider on the issue of malice the party respondents' prosecution of their claims for three years without seeking a hearing or their voluntary dismissals of these cases in 1998(App. 23-25).

As for the respondent attorneys, the majority first concluded that there was a triable issue of fact whether Death Row's attorney Kenner acted with malice when he drafted the abuse of process claim against Tucker(App. 26-28). That is, there was sufficient evidence from which a rational fact finder could infer that Kenner knew the abuse of process claim lacked merit because the underlying factual allegations of a threat made to Death Row's Knight outside of any judicial process fail to show what the relevant law requires, i.e., the misuse of a *judicial* process(App. 26). According to the majority, this discrepancy between Kenner's allegations in *Death Row v. Tucker* and the elements of the tort of abuse of process was enough to infer malice on his part or a knowing lack of probable cause when he filed the action containing these allegations(App. 26-28).

Finally, the majority saw no evidence against Ortner, Thomas or Paul Hastings that they "affirmatively knew that the factual bases for the underlying suits to be false at the time that the suits were filed....Nor have the [petitioners] shown that any

attorney-Defendant continued to prosecute any of the remaining claims after learning that they were not supported by probable cause"(App. 28). The petitioners' remaining claim for Mr. Tucker's loss of consortium was similarly found to be insufficient to raise a triable issue of fact(App. 29-30). A judgment entered affirming the entry of summary judgment in favor of the respondents except for the claim of abuse of process against the respondent Kenner which was remanded to the district court(App. 30-31).

Circuit Judge Noonan dissented in part from the majority's rulings(App. 31-56). Applying clear California law that a lack of probable cause can be an element in the proof of malice and that knowledge of the lack of probable cause is *itself* proof from which a jury may infer malice, Judge Noonan provided seven examples in the record of proof from which a jury could reasonably infer that Death Row and Kenner knowingly brought its action against Tucker without probable cause and that such proof constitutes malice(App. 45-48).

This proof consists of: (1) the voluntary withdrawal of its action against Tucker three years after its filing for reasons which a jury could infer were "window-dressing meant to disguise the absence of any fact supporting the outrageous claims asserted;" (2) that the tandem complaints of Interscope and Death Row against Tucker were obviously drafted in concert and Interscope's failure to allege a RICO violation would permit a jury to infer that, more probably than not, "Death Row and Kenner knew no facts to support their racketeering claims;" (3) the vague, exotic allegations of unspecified criminal conduct by Tucker

producing no actual harm but yet somehow tantamount to interference with interstate commerce would let a jury infer that Kenner "was merely using boilerplate language without possession of any facts on which to act;" (4) the unsubstantiated and unanchored RICO charges against NPC could be found by a jury to have been made solely to depict Tucker as faithless fiduciary who would manipulate an educational group for her own private profit; (5) if, as established by the majority, Kenner lacked probable cause to bring the claim for abuse of process, a jury could then infer that Death Row lacked probable cause to make this claim as well and that Kenner knew there was no probable cause for this claim; (6) the absence of any actual breach of contract between Death Row and Interscope undercuts Kenner's allegations against Tucker and permits a jury to infer that "Kenner knowingly brought and continued Death Row's actions without probable cause;" and (7) since the August 7, 1995, letter authorized NPC—*not* Tucker—to negotiate a distribution contract, Tucker could not have harbored an ulterior motive as alleged and Kenner had no probable cause and demonstrated malice "in attributing hidden motives to Tucker where no such evidence existed"(App. 46-48).

Beyond the evidence of a lack of probable cause by Death Row and Kenner in bringing and pursuing their underlying action against Tucker, the dissent identified further evidence in the record from which a jury could infer malice: (1) the knowing bringing of a baseless claim; (2) the charges against Tucker evince hatred:

> A 68 year-old civic leader is charged with a spate of offenses that would be appropriate to an

> indictment of a mafioso. She is an extortionist and a racketeer. She has organized a racketeering enterprise to enrich herself. *Malice gleams from Death Row's complaint.*

(App. 48)(emphasis supplied). In addition, there was other evidence which showed that (3) Tucker's first-amendment based, tough-minded and democratic approach to challenging gangsta rap could not possibly have amounted to criminal conduct beginning in 1994, as alleged, and a jury could find that these baseless allegations were maliciously "conjured up;" (4) "the dogged determination to do in Tucker is manifestly malicious when her wooing of a senior American political leader (former Education Secretary William Bennett) is asserted to constitute criminal behavior;"(5) her collaboration with Time Warner executives in her racketeering scheme is *per se* malicious because it is nonsensical and implausible; (6) the way Death Row and Kenner conducted this case in discovery/depositions before dismissing it; and (7) Death Row's ad in a music industry publication which symbolically targeted Tucker for harm and the two songs by Tupac which demonstrated the most vile antipathy for Tucker(App. 48-52). As the circuit judge observed, "[a] jury could well conclude, if this evidence does not exhibit malice, what would?"(App. 50).

Some of this same proof could have justified a jury to infer that Interscope and its attorneys brought with malice its own action against Tucker on baseless facts and continued it for three years "without a foundational fact" and "after [it] had lost even a smidgen of probability"(App. 52-53).

For these reasons, Circuit Judge Noonan would have reversed the summary judgments in favor of Death Row, Interscope, Kenner, Ortner and Paul Hastings(App. 54). As he saw it, there were triable issues as to probable cause and whether these two suits "were knowingly and therefore maliciously filed without probable cause and were prosecuted with malice for three years in an oppressive way, long after a scintilla of cause had been extinguished"(App. 54).

In reaching this result, the dissent, contrary to the majority, applied California law which provides that malicious prosecution can be proven by the malicious acts of the defendant carried out *after* the defendant has brought the lawsuit of which the plaintiff complains(App. 54-55). In addition, he applied the established principle of California law that the knowing lack of probable cause may itself constitute proof of malice(App. 55). As Judge Noonan observed, "California law clearly states that although lack of probable cause alone does not support an inference of malice, 'malice may still be inferred when a party *knowingly* brings an action without probable cause. *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App.4th 613, 634(2002)(emphasis in original).' Knowing that he has no basis for what he alleges, the allegator manifests malice in the hateful acts he imagines and attributes to the enemy he is pursuing"(App. 55).

Finally, in view of the majority's conclusion that a jury question had been presented about Kenner's malice in bringing Death Row's abuse of process claim, the dissent wondered

> why the same rule does not apply to the other claims advanced by the respondents where inferably they know they had no probable cause. I do not understand how this court, years after the original litigation, is capable of determining the state of mind of the [respondents] here. That is a question of fact. As a question of fact it for the jury to decide.
>
> ....[This] court is in no position to conclude that the lawyers and their clients believed that these charges were true, rather than unscrupulous inventions. *Indeed almost anyone would doubt that sophisticated lawyers could have known anything except that the charges were false.*

(App. 55-56)(emphasis supplied).

On March 19, 2008, the court of appeals denied the petitioners' timely filed petition for rehearing *en banc*(App. 110-111). The petitioners now respectfully brings this petition to the Court seeking a writ of certiorari to the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Nullifies Substantive California Law On The Proof Necessary To Prove Malice For The Claim Of Malicious Prosecution, Creates Unprincipled Federal Common Law On The Subject And Subverts The Policies Of Comity And Federalism Enunciated In *Erie R. Co. v. Tompkins*, 304 U.S. 65(1938).

The law of California on the evidence necessary to prove malice for maintaining a claim of malicious prosecution is crystal clear. Malicious prosecution is the

institution and maintenance of judicial or administrative proceedings against another with malice and without probable cause. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App.4th 478, 494(Cal. App. 1998). *Bertero v. National General Corp.*, 13 Cal.3d 43, 50(Cal. 1974).

The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the underlying action. *Padres L.P. v. Henderson*, 114 Cal. App. 4th 495, 522(Cal. App. 2003). *Sierra Club Foundation v. Graham*, 72 Cal. App. 4th 1135, 1157(Cal. App. 1999). It is usually proven by circumstantial evidence. *Padres L.P. v. Henderson, supra.*

Malice means not only actual ill will or hostility, whether express or implied. Its essential core is when the prior litigation complained of was instituted primarily for an improper purpose. *Sierra Club Foundation v. Graham*, 72 Cal. App. 4th at 1157. The hallmark of suits brought for an improper purpose are those where (1) the person bringing them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of ill will or hostility; or (3) the proceedings are brought to induce settlement with no relation to the merits of the claim. *Sierra Club Foundation v. Graham, supra. Albertson v. Raboff*, 46 Cal.2d 375, 383(1956).

Thus improper purpose or motive will be found where the proceedings were begun by one who did not believe his claim would be held valid, i.e., he knowingly began an action without probable cause to do so. *Id.* Thus while a lack of probable cause *alone* will not

support an inference of malice to support a claim of malicious prosecution, see *Downey Venture v. LMI Ins. Co.*, 66 Cal. App.4th at 496-499, malice will still be inferred where a person *knowingly* brings an action without probable cause. *Padres L.P. v. Henderson*, *supra*. *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App.4th 613, 634(2002). *Leonardini v. Shell Oil Co.*, 260 Cal. App. 3d 547, 568(Cal. App. 1990). In this sense, the want of probable cause can become a factor in determining the existence of malice sufficient to support a claim of malicious prosecution. *Id. Accord, Soukup v. Law Offices of Herbert Hafif*, 39 Cal. App. 4th 260, 292(Cal. 2006); *Grindle v. Lorbeer*, 196 Cal. App. 3d 1461, 1465-1466 (Cal. App. 1987).

In assessing whether malice is present, the actions taken by the initiator of the underlying action *after* his lawsuit was filed is now a relevant consideration under California law. Contrary to the majority's view here, it is *not* restricted only to conduct occurring before the filing of the lawsuit. In *Zamos v. Stroud*, 87 P.3d 802, 807-811(Cal. 2004), the Supreme Court of California overruled prior decisional law to the contrary and held that an attorney who continues to prosecute an action discovered to lack probable cause will be liable for malicious prosecution. *Id. Accord, Soukup v. Law Offices of Herbert Hafif*, 39 Cal. App. 4th at 296-297; *Bergman v. Drum*, 129 Cal. App. 4th 11, 25-26(Cal. App. 2005).

The malice element for malicious prosecution presents a classic question of the respondents' state of mind, his subjective intent, and almost always presents a question of fact to be determined by a jury, especially if the facts relied upon to show probable cause or the

defendant's state of mind are in dispute. *Sheldon Appel Co. v. Albert & Oliker*, 760 P.2d 498, 507-508(Cal.1989)(*en banc*). *Tool Research & Engineering Corp. v. Henigson*, 46 Cal. App. 3d 675, 683(Cal. App. 1975). *Franzen v. Shenk*, 192 Cal. 572, 576-577(Cal.1923). Once that conflict has been resolved by a jury, the question whether the facts as they are found to be constitute probable cause for bringing the former action is a question of law for the court. *Franzen v. Shenk, supra. Tool Research & Engineering Corp. v. Henigson, supra.*

Finally, after *Zamos*, *Bergman*, and *Soukup*, California law holds that an attorney who begins or continues to prosecute a civil action which knowingly lacks probable cause comes within that class of the least meritorious cases which warrant exposing the attorney to liability for malicious prosecution. See *Padres L.P. v. Henderson*, 114 Cal. App. 4th at 523-524; *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App.4th at 634; *Roberts v. Sentry Life Insurance*, 76 Cal. App. 4th 375, 381(Cal. App. 2000).

The substantive law of California is therefore clear that while a lack of probable cause *alone* will not support an inference of malice to support a claim of malicious prosecution, malice will still be inferred where a person *knowingly* brings an action without probable cause. In addition, in assessing whether malice is present, the actions taken by the initiator of the underlying action *after* his lawsuit was filed is now relevant proof of malice for malicious prosecution under California law.

Yet the majority ignored this substantive law of California. First, it suggested that malice in the mind of the respondents can only be shown by what is alleged on the face of the complaint. This is not the law of California. Malice can be proven by relevant circumstantial evidence and includes any malicious acts carried out *after* the filing of the complaint in the continuation of the lawsuit.

Second, the majority stressed the objective nature of probable cause and concluded that the absence of probable cause is not relevant to malice. This is not the law of California. While a lack of probable cause *alone* will not support an inference of malice to support a claim of malicious prosecution, malice will still be inferred where a person *knowingly* brings an action without probable cause; and the want of probable cause is then a relevant factor in determining the existence of malice sufficient to support a claim of malicious prosecution.

Bounded by these misconceptions about of California law which it was applying in this diversity suit, the majority's assessment of malice on this summary judgment record was unfairly constricted to just pre-complaint conduct of the respondents and ignored other crucial facts which showed that the respondents knowingly brought their suits without probable cause. The dissent's dynamic reading of the record, unhinged by the majority's crabbed dimensions of its own analysis, found abundant facts which provide ample evidence for a jury to infer that the respondents brought their actions against Tucker with malice and without probable cause.

The way the majority read California law on malice, i.e, by constricting proof of malice to only pre-complaint conduct by the actors, by ignoring post-complaint conduct, by deciding that lack of probable cause cannot prove malice in any event, by disdaining the use of circumstantial evidence to create the inference of malice and by suggesting that the subjective intent of malice cannot be proven by events relevant to that inquiry upon summary judgment ignores applicable State law and undermines the policies of federalism and comity enunciated by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938).

In addition, the majority's decision undermines the viability of malicious prosecution claims under California law, leaving first amendment speakers/actors like the petitioners without adequate protection against those who seek to retaliate against them for the exercise of their first amendment rights. This unfair result "chills' first amendment conduct which should be protected and dilutes the concept of malice under California law, skewing any legal analysis which depends on malice for its validity.

Under *Erie*, when a federal court exercises diversity, pendent or supplemental jurisdiction over state law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and

acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742(2000)(Rehnquist, C.J., concurring).

As this Court explained in *Erie*,

> the Constitution of the United States [including the Tenth Amendment]...recognizes and preserves the autonomy and independence of the States----independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

304 U.S. at 78-79. See *Alden v. Maine*, 527 U.S. 706, 754(1999)(our federal system bespeaks the fact that the various States remain sovereign entities whose judicial independence must be respected by Article III courts).

Erie, a vital expression of our federal system, therefore mandates that a federal court sitting in diversity jurisdiction over these suits apply the substantive law of California, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428(1996). *Salve Regina College v. Russell*, 499 U.S.

225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York*, *supra*. *Gasperini*, 518 U.S. at 430-431.

In addition, this Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner by which they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell*, *supra*, quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209(1938). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237(1940); *Six Companies v. Highway Dist.*, 311 U.S. 180, 188(1940).

Moreover, in view of the court of appeals' affirmative duty under the decisions of this Court to review independently and then correct the district court's determination of state law when fixing the rights of the parties, *Erie*, *supra*; *Salve Regina College v. Russell*, 499 U.S. at 231; 234, it was incumbent on the court of appeals for the Ninth Circuit to carry out this task so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*— "discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468(1965)— were accomplished. *Gasperini*, *supra*.

The majority of the court of appeals failed in this fundamental duty. Creating federal "general" common law at odds with the substantive law of California in order to reach a particular result, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726(2004), it wrongly deprived the petitioners of a jury on trial on their legitimate claims that the respondents brought their suits against Tucker with malice and without probable cause.

This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145(1996), is a matter which invokes this Court's power of superintendency over the federal courts so that the decision below does not damage federal-state relations, does not lead to divergent opinions on the proof of malice for malicious prosecution, a legitimate interest of California state law as well as for its public policy generally, and does not promote forum shopping, all considerations which prompted this Court to decide *Erie* in the first place.

2. The Federal Courts Are Abusing Summary Judgment Procedure By Weighing Evidence and Finding Facts In Order to Dispose of Triable Facts Questions Like The State Of Mind Of The Respondents, Denying The Petitioners The Jury Trial Guaranteed Them By the Seventh Amendment On This Crucial Fact Issue.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental

"reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure now contained in Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78(2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of crucial, disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers,* 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional,* 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This overuse of summary judgment has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,* 34 B.C. L. Rev. 203, 229(1993). Likewise, it was found that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. The majority improperly resolved the crucial fact question of malice to support malicious prosecution, a truly subjective inquiry concerning the state of mind of the respondents, by adopting a cramped view of the relevant evidence which should attend such an inquiry, a view at odds with California law, and by treating the proof in piecemeal fashion without connecting each part to the other in order to conclude that malice was absent.

The dissent's dynamic view of this summary judgment record, on the other hand, carried out with full appreciation of the relevant law of California, identified over twenty (20) discrete items of proof from which a jury could reasonably infer that the respondents brought their suits against Tucker with malice and without probable cause. The petitioners deserve a jury trial on these crucial fact question and denying them this opportunity is not only unfair but also unconstitutional.

This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the federal courts to reassert their proper role in deciding summary judgment motions, i.e., reaffirming the thrust of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986) which require them to draw all inferences in favor of the nonmoving party and to refrain from making any credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. See *Beard v. Banks*, 548 U.S. ___,___(2006)(Ginsburg, J., dissenting).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse these judgments and remand the matter to the United States District Court for the Central District of California, with instructions that the petitioners' claims in these consolidated appeals against the respondents for malicious prosecution and abuse of process be tried to a jury; or provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 05-56045, No. 06-55376

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF C. DELORES TUCKER, by and through William Tucker as PERSONAL REPRESENTATIVE; and WILLIAM TUCKER individually,

Plaintiffs-Appellants,

v.

INTERSCOPE RECORDS, INC.; DEATH ROW RECORDS, INC.; CHARLES B. ORTNER; PAUL, HASTINGS, JANOFSKY & WALKER, LLP,

Defendants-Appellees.

ESTATE OF C. DELORES TUCKER, by and through William Tucker as PERSONAL REPRESENTATIVE; and WILLIAM TUCKER individually,

Plaintiffs-Appellants,

v.

DAVID KENNER; GEOFFREY THOMAS; JACK PALADINO; PAUL PALADINO, Defendants-Appellees.

May 11, 2007, Argued and Submitted, Pasadena, California

February 8, 2008, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Central District of California. D.C. No. TCV-99-03679-RMT, D.C. No. CV-99-06129-RMT. Robert M. Takasugi, District Judge, Presiding.

COUNSEL: Richard C. Angino, Harrisburg, Pennsylvania, for the appellants.

Steven A. Marenberg, Perry M. Goldberg, & Jason Linder, Los Angeles, California, for appellees David Kenner, Geoffrey Thomas, Interscope Records, Inc., Interscope Records, Charles B. Ortner, and Paul, Hastings, Janofsky & Walker LLP. Ronald L. Leibow, Los Angeles, California, for appellee Death Row Records, Inc.

Before: John T. Noonan, Richard A. Paez, and Richard C. Tallman, Circuit Judges. Opinion by Judge Paez; Partial Concurrence and Partial Dissent by Judge Noonan.

OPINION BY: Paez

OPINION

PAEZ, Circuit Judge:

In these consolidated malicious prosecution cases,[1] William Tucker and the Estate of Cynthia Dolores Tucker ("the Tuckers"),[2] appeal the district court's grant of summary judgment to all defendants in both

cases. In *Tucker v. Interscope*, we affirm the district court's ruling as to all defendants. In *Tucker v. Kenner*, we affirm the district court's summary judgment as to defendant Thomas; however, as to defendant Kenner we affirm the district court's ruling in part and reverse in part, and remand for trial. We also affirm the district court's grant of summary judgment as to Mr. Tucker's loss of consortium claim in both cases.

I.

Overview

In the early 1990s, Cynthia DeLores Tucker, whose history as an activist dates back to the civil rights movement of the 1950s and 1960s, became concerned with the increasing popularity of the style of hip-hop music known as "gangsta rap," particularly its appeal to African-American youth. She enlisted the support of notable entertainers including Dionne Warwick and Melba Moore to engage in lobbying and media outreach, with the goal of limiting the sale of gangsta rap to young people. Her efforts brought her head-to-head with two of the genre's most successful production and distribution labels: Death Row Records, Inc. and Interscope Records, Inc. After Tucker and other members of her coalition approached Suge Knight, then-CEO of Death Row, about entering into a distribution contract with the media behemoth Time Warner, Inc., Death Row and its distributor Interscope filed separate federal court actions (the "underlying litigation") against Tucker, alleging intentional interference with their exclusive contractual relationship and other related claims.

After Death Row and Interscope successfully moved for dismissal without prejudice, the Tuckers filed separate lawsuits against the two entities and their lawyers in federal district court, invoking diversity jurisdiction and charging them with malicious prosecution. Her husband William Tucker sought damages for loss of consortium as a derivative claim. Applying California law, the district court granted summary judgment in both cases based on its conclusion that the Tuckers' evidence did not create a genuine issue of fact as to whether any of the defendants had acted with malice, a necessary element of a malicious prosecution claim. The district court also dismissed Mr. Tucker's loss of consortium claim on the grounds that Mr. Tucker failed to carry his burden of production and that without a viable claim for malicious prosecution, his derivative claim failed as a matter of law.

Reviewing *de novo* the grants of summary judgment in both cases, we conclude that, on the evidentiary record before the district court, it correctly concluded--except with regard to the claim for abuse of process included in the complaint filed by Death Row's attorney David Kenner--that the Tuckers did not present sufficient evidence to defeat the motions for summary judgment on the issue of malice. We therefore affirm the summary judgment in *Tucker v. Interscope*, and affirm in part and reverse in part the district court's grant of summary judgment in *Tucker v. Kenner*. We remand for trial the Tuckers' malicious prosecution claim against Kenner to the extent that it is predicated on the abuse of process claim that he included in *Death Row v. Tucker*. As we explain below, as to that one claim the Tuckers have raised a genuine triable issue of fact.

II.

Factual and Procedural Background

To fully understand these consolidated appeals, it is necessary to set forth the history of the two cases in some detail. Because the district court did not provide an extensive recitation of undisputed facts, we rely primarily on the parties' briefs and the record for the following factual overview, noting factual disputes where they exist and construing any ambiguities in favor of the Tuckers, as the non-moving parties.

A. The Underlying Dispute

Mrs. Tucker was a prominent civil rights advocate who served as the first African-American Secretary of State of Pennsylvania, the first African-American chair of the National Federation of Democratic Women, and the Chair of the Democratic National Committee Black Caucus. She also cofounded and chaired the National Political Congress of Black Women, Inc. ("NPC"), a non-profit organization dedicated to promoting African-American women's education and political, economic, and cultural development.

During the early 1990s, Mrs. Tucker became troubled by the growing popularity of "gangsta rap."[3] Of particular concern to Mrs. Tucker was the genre's influence on African-American youth, who she feared would adopt the music's violent and sometimes misogynist perspectives. At the NPC's biennial meeting in 1993, Mrs. Tucker enlisted the help of well-known artists Dionne Warwick, Melba Moore, and Terri Rossi, along with lobbyist Voncier Alexander, to form

an Entertainment Commission for the NPC that would support African-American entertainers, and particularly women. The Entertainment Commission adopted a three-part mission: to eliminate barriers facing African-American artists and executives; to mobilize African-American entertainers to address important issues affecting African-American communities; and to "reshap[e] and maintain[ ] positive images to preserve the dignity and heritage of our youth." From 1993 to 1995, the Entertainment Commission worked with prominent individuals in entertainment and media, along with religious leaders and lobbyists, to put pressure on music producers and distributors to halt the sale of gangsta rap to minors. Among Mrs. Tucker's more high-profile efforts in pursuit of this goal were an appearance at a 1995 Time Warner shareholder's meeting, where she offered Time Warner executives $ 100 to read aloud gangsta rap lyrics from albums distributed under its name, and a protest against the sale of gangsta rap albums outside a Tower Records store, for which she was arrested.

Death Row is an independent record label founded in 1991 by Suge Knight and the well-known rap artist Dr. Dre. Death Row signed extremely popular gangsta rap stars including Dr. Dre, Tupac Shakur ("Tupac"), Snoop Doggy Dogg ("Snoop"), and Danny Boy, generating enormous profit, and notoriety, for the label throughout the mid-1990s. Interscope is a general partnership that records and distributes popular music. Like Death Row, it gained success and prominence during the 1990s through the distribution and sale of gangsta rap. From 1992 to 1998, Death Row maintained an exclusive contractual relationship with Interscope, whereby Interscope was the sole distributor of Death Row's

music.

In 1995, Mrs. Tucker and the Entertainment Commission began to direct their anti-gangsta rap campaign at Death Row. Knight, Death Row's outside counsel David Kenner, and Omar Bradley, who was then the mayor of Compton, California, were invited to the NPC's biennial convention in July 1995, where they attended a meeting with Mrs. Tucker and other members of the Entertainment Commission. Some facts--including who initiated the meeting--are in dispute, but it is uncontested that this meeting occurred. According to Mrs. Tucker's deposition testimony, during the meeting she spoke with Knight about the influence of gangsta rap on African-American youth and asked him to change the violent and misogynist nature of the lyrics on the albums he produced. Mrs. Tucker testified that Knight agreed to make changes and to come back to the Entertainment Commission with a sample.

At some point shortly before or after the NPC convention, Warwick held an informal meeting with Knight, Snoop, and Danny Boy at her home in Los Angeles. According to Warwick, the group discussed removing several references to women as "bitches" and "ho's" on *Dogg Food*, an album by Tha Dogg Pound that Death Row would soon be releasing. Warwick testified at her deposition that she relayed this information to Mrs. Tucker, Alexander, and Michael Fuchs, then-CEO of Warner Music Group, an affiliate of Time Warner.

The summary judgment record contains a letter, dated August 7, 1995, printed on NPC letterhead. The letter appears to be from Knight, though it does not bear his

signature. It is addressed to Mrs. Tucker in her capacity as chair of the NPC. The letter commemorates the purported details of Knight's meeting with Mrs. Tucker at the NPC convention and reads in part:

> I [Knight] hereby designate and authorize the [NPC] to negotiate an acceptable contract relationship with Time Warner Inc. regarding the production and distribution of [Death Row] music products. I hereby understand that the above arrangement is based on the fact that my company will cease and desist from the production and distribution of misogynist, obscene and pornographic music. . . . This authorization is submitted to demonstrate my good faith in cooperating with the [NPC] in every way possible to reverse the negative trends in African-American music.There is conflicting testimony as to the circumstances of the letter's drafting, but according to Mrs. Tucker's own testimony it was drafted in the NPC office at her request. Mrs. Tucker also testified that she "gave the final okay to it."

On August 8, 1995, another meeting took place at Warwick's house. In attendance were Warwick, Mr. Tucker, Fuchs, and Alexander. Knight was invited but did not attend. Kenner testified at his deposition that he spent that day with Knight and that Knight received several phone calls throughout the day from someone at the meeting. According to Kenner, Knight was offered $ 80 million and two recording studios if he would agree to break Death Row's contract with Interscope and enter into a new contract with the Warner Music Group. Warwick and Mr. Tucker each testified, when

deposed, that no one at the meeting made such an offer to Knight; Warwick also testified that Knight called her that day "at least four times" to discuss problems he had with the August 7 letter.

On August 9, 1995, Kenner sent Warwick a letter on Knight's behalf, indicating that "Mr. Knight has never conveyed [the] authorization [for the NPC to negotiate a contract with Death Row and Time Warner] and to the extent that there is any misapprehension . . . Mr. Knight hereby specifically repudiates any such agreement. . . . Mr. Fuchs [sic] offer, as conveyed to Mr. Knight, of an $ 80,000,000 advance and to provide him with two studios if he would agree to sign directly with Time/Warner is specifically rejected."

B. The Underlying Litigation

On August 15, 1995, Interscope filed a complaint ("*Interscope v. Tucker*") in the United States District Court for the Central District of California, charging Mrs. Tucker with inducement to breach contract, interference with contractual relations and prospective business advantage, attempting to induce breach of fiduciary duty, and unfair business practices and unfair competition. Interscope sought damages and an injunction enjoining Mrs. Tucker from attempting to induce Death Row to breach its contract, interfering with the Death Row contract, tortiously interfering with Interscope's prospective business advantage, and attempting to induce Time Warner and/or Atlantic Records to breach their fiduciary duties to Interscope.[4] The complaint listed Charles Ortner, Geoffrey Thomas, and Belinda Orem from the law firm of Paul, Hastings,

Janofsky & Walker, LLP ("Paul Hastings") as attorneys for Interscope.

On August 17, 1995, Death Row filed a complaint ("*Death Row v. Tucker*") in the United States District Court for the Central District of California, naming as defendants Mrs. Tucker, the NPC, Time Warner, Inc., Warner Music Group, Inc., Fuchs, and Gerald Levin, who was then-chair of Time Warner's board of directors. The complaint charged all defendants with racketeering and/or aiding and abetting racketeering under 18 U.S.C. § 1962(b) and (c); conspiring to violate § 1962(b) and (c); conspiring to interfere with advantageous business relationships; extortion; unfair business practices; and abuse of process. The complaint also sought to enjoin all defendants from engaging in extortion, interfering with Death Row's First Amendment rights, and "any other unlawful act alleged in this complaint." Kenner was listed as counsel for Death Row.

Interscope v. Tucker and *Death Row v. Tucker* were assigned to the same district court judge. The district court granted Mrs. Tucker's motion for judgment on the pleadings in *Interscope v. Tucker* as to the claim for inducement to breach a contract but denied the motion as to the remaining claims. Pre-trial activity continued until June 1998, when Interscope and Death Row each filed motions for voluntary dismissal on the grounds that "Tucker is essentially judgment proof" and Interscope and Death Row no longer had a contractual relationship "for business reasons unrelated to this litigation." The district court granted the motions and dismissed both *Interscope v. Tucker* and *Death Row v.*

Tucker without prejudice, over Mrs. Tucker's objection that the suits should be dismissed with prejudice.

B. The Malicious Prosecution Litigation

Within a month of the dismissal, the Tuckers filed their complaint in *Tucker v. Interscope* in the United States District Court for the Eastern District of Pennsylvania, invoking diversity jurisdiction. The complaint charged Interscope, Death Row, Ortner, and Paul Hastings ("Interscope Defendants") with malicious use of civil proceedings, abuse of process, intentional infliction of emotional harm, common law civil conspiracy, and racketeering conspiracy in violation of 18 U.S.C. § 1962(d). Upon Defendants' motion, the case was transferred to the Central District of California. The Tuckers later successfully moved to withdraw all but the malicious prosecution and loss of consortium claims.

The Tuckers filed their complaint in *Tucker v. Kenner* in the United States District Court for the Central District of California, naming Kenner and Thomas as defendants ("Kenner Defendants"), along with five other defendants who were subsequently dismissed, and again invoking diversity jurisdiction.[5] The *Kenner* complaint similarly raised claims for malicious prosecution and loss of consortium, in addition to abuse of process, slander, and negligent and intentional infliction of emotional distress. The district court later dismissed all but the malicious prosecution and loss of consortium claims.

After discovery, the Interscope and Kenner Defendants filed separate motions for summary judgment based on (1) an affirmative defense of unclean hands; (2) lack of

favorable termination; (3) existence of probable cause; (4) lack of malice; (5) insufficient evidence of damages; and (6) no loss of consortium. The district court granted the motion on the basis of insufficient evidence of damages and no loss of consortium but declined to address the other issues on the ground that they were moot. We reversed the summary judgment rulings in both cases in an unpublished memorandum disposition. *See Tucker v. Kenner*, 85 F. App'x 610 (9th Cir. Jan. 14, 2004) (unpublished).[6] We remanded with instructions to the district court to consider the remaining grounds for summary judgment: unclean hands; lack of favorable termination; existence of probable cause; and lack of malice. *Id.* at 614.

On remand, the Interscope and Kenner Defendants again filed for summary judgment asserting: (1) an unclean hands affirmative defense; (2) lack of favorable termination; (3) no loss of consortium; and (4) existence of probable cause for the underlying claims; and (5) lack of malice.

In *Tucker v. Interscope*, the district court concluded that genuine issues of fact existed as to favorable termination and Defendants' affirmative defense of unclean hands. It concluded, however, that all Interscope Defendants had probable cause to pursue claims for intentional interference with contractual relationship, intentional interference with prospective business advantage, and unfair business practices and unfair competition. However, regarding Interscope, Ortner, and Paul Hastings, the district court found that genuine issues of fact existed as to whether they had probable cause to pursue the claims for inducement to breach contract and inducement to breach fiduciary

duty. Regarding Death Row, the district court found that genuine issues of fact existed as to whether it had probable cause to pursue the claims for RICO violations, state law extortion, and abuse of process.

In addition, the district court concluded that the Tuckers "failed to produce any evidence to show that the Interscope Defendants acted with malice" in filing the underlying lawsuits and that Mr. Tucker's alleged injuries were insufficient to support a claim for loss of consortium. It therefore dismissed the malicious prosecution claim based on insufficient evidence of malice and dismissed the loss of consortium claim because it was alleged as a derivative claim and because Mr. Tucker's evidence was insufficient to establish a loss of consortium. The Tuckers timely appealed the district court's judgment, Case No. 05-56045.[7]

In *Tucker v. Kenner*, the district court concluded that Kenner and Thomas had probable cause to pursue the claims for intentional interference with contractual relationship, intentional interference with prospective business advantage, and unfair business practices and unfair competition. It concluded that material issues of fact remained whether Thomas had probable cause to pursue the claims for inducement to breach contract and inducement to breach fiduciary duty and whether Kenner had probable cause to pursue the claim for abuse of process. The district court further concluded that material issues of fact remained as to favorable termination and Defendants' unclean hands affirmative defense.

As in *Tucker v. Interscope*, however, the district court concluded that the Tuckers "failed to produce any

evidence to show that [Thomas] acted with malice" and therefore dismissed the malicious prosecution and loss of consortium claims against him. The court also dismissed the loss of consortium claim against Kenner for lack of evidence but did not address whether the Tuckers' evidence could show that Kenner acted with malice. In response to this ambiguity, Kenner filed a second motion for summary judgment on the basis of lack of malice and for clarification of the court's prior ruling. The district court's subsequent ruling determined that the malicious prosecution claim against Kenner should be dismissed because "the evidence Plaintiffs offer in addition to this finding is insufficient to show that Kenner acted with malice." Therefore, "[a] reasonable jury could not return a verdict in [the Tuckers'] favor" and summary judgment was warranted.[8] The Tuckers timely appealed this judgment as well, Case No. 06-55376.

III.

Jurisdiction and Standard of Review

The district court had original jurisdiction over both cases under 28 U.S.C. § 1332. Our jurisdiction over the Tuckers' timely appeals arises under § 1291. We review *de novo* a district court's grant of summary judgment. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001).

Federal rather than California procedural rules govern this diversity action. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). Summary judgment is not warranted if a material issue of fact exists for trial.

Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A defendant who moves for summary judgment bears the initial burden of proving the absence of any triable issue of fact but need not produce evidence negating elements of a claim for which the plaintiff bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A non-moving plaintiff can defeat a motion for summary judgment by producing evidence "such that a reasonable jury could return a verdict" in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Pursuant to Federal Rule of Civil Procedure 56(e), a non-moving plaintiff cannot "rest upon the mere allegations or denials of the adverse party's pleading" but must instead produce evidence that "set[s] forth specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks omitted).

IV.

The Malicious Prosecution Claims

Under California law, a malicious prosecution claim is disfavored and requires proof that the underlying litigation:

> (1) was *commenced* by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was *brought* without probable cause; and (3) was *initiated* with malice.*Zamos v. Stroud*, 32 Cal. 4th 958, 12 Cal. Rptr. 3d 54, 87 P.3d 802, 807 (Cal. 2004) (internal quotation marks, citations, and alterations omitted). In addition, the plaintiff

must demonstrate "resulting damage by way of attorneys' fees incurred in defense, mental distress, and/or injury to reputation or social standing." *Harbor Ins. Co. v. Cent. Nat'l Ins. Co.*, 165 Cal. App. 3d 1029, 211 Cal.Rptr. 902, 907 (Ct. App. 1985). Because, with one exception, we conclude that the Tuckers' evidence did not establish a genuine issue of fact as to malice, we do not address the element of favorable termination for Mrs. Tucker.[9] We discuss the element of probable cause to the extent it relates to malice.

A. The Elements of Malice and Probable Cause

"The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. . . ." *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498, 503 (Cal. 1989). In *Sierra Club Found. v. Graham*, 72 Cal. App. 4th 1135, 85 Cal.Rptr.2d 726 (Ct. App. 1999), the California Court of Appeal explained:

> [M]alice is present when proceedings are instituted primarily for an improper purpose. Suits with the hallmark of an improper purpose are those in which: (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a

> settlement which has no relation to the merits of the claim.

Id. at 739-40 (internal quotation marks, citation, and alteration omitted). Malice is usually a question of fact for the jury to determine. *See Sheldon Appel Co.*, 765 P.2d at 503. Summary judgment on the basis of lack of malice is nonetheless appropriate when there is no evidence from which a reasonable fact finder could conclude that the defendant pursued the underlying action with malice. *See Ghebreselassie v. Coleman Sec. Serv.*, 829 F.2d 892, 899 (9th Cir. 1987) (affirming summary judgment dismissal of malicious prosecution claim under California law when plaintiff could "point to no evidence from which a fact-finder could reasonably infer that the investigators or the employer lacked probable cause or that they acted with malice").

Probable cause, in contrast, is a question of law that turns on whether the underlying claim was "legally tenable, as determined on an objective basis." *Padres L.P. v. Henderson*, 114 Cal. App. 4th 495, 8 Cal.Rptr. 3d 584, 600 (Ct. App. 2004). Whereas the element of malice focuses on the defendant's state of mind at the time he initiated the underlying litigation, probable cause:

> "is measured by the state of the defendant's *knowledge*, not by his *intent* . . . . [T]he standard applied to defendant's consciousness is external to it. The question is not whether *he* thought the facts to constitute probable cause, but whether *the court* thinks they did."

Sheldon Appel Co., 765 P.2d at 508 (quoting *Dir. Gen. v. Kastenbaum*, 263 U.S. 25, 27-28, 44 S. Ct. 52, 68 L. Ed. 146 (1923)) (emphasis in *Sheldon Appel Co.*).

The elements of malice and probable cause therefore require different showings. The probable cause inquiry is objective, asking whether a reasonable person would have thought that the claim was legally tenable "without regard to [her] mental state." *Roberts v. Sentry Life Ins.*, 76 Cal. App. 4th 375, 90 Cal.Rptr.2d 408, 412 (Ct. App. 1999). The only potential factual issue for purposes of probable cause is "the state of the defendant's knowledge" at the time she initiated the underlying lawsuit. *Sheldon Appel* Co., 765 P.2d at 507.[10] "[W]hen the state of the defendant's factual knowledge is resolved or undisputed, it is the court which decides whether such facts constitute probable cause or not." *Id.* at 508.[11]

Malice, on the other hand, is shown through evidence of "the *subjective* mental state of the defendant in instituting the prior action." *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 78 Cal.Rptr.2d 142, 152 (Ct. App. 1998) (internal quotation marks omitted). Because the objective reasonableness of the underlying lawsuit is separate from a defendant's subjective mental state in bringing it,

> by itself, the conclusion that probable cause is absent logically tells the trier of fact nothing about the defendant's subjective state of mind. . . . [T]he presence of malice must be established by *other, additional evidence* . . . . [T]hat evidence must include proof of either actual hostility or ill will on the part of the defendant . . . to

> deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant.

Id. at 153-54 (citations and footnote omitted) (emphasis added); *see also Grindle v. Lorbeer*, 196 Cal. App. 3d 1461, 242 Cal.Rptr. 562, 565 (Ct. App. 1987) ("[I]n a given case, unreasonable behavior which could lead to a determination that there was a lack of probable cause to file,*might not provide a sufficient basis to infer malice.*" (emphasis added) (internal quotation marks omitted)).

As recently as 2002 the California Court of Appeal has emphasized that where malice must be shown, only "other, additional evidence" apart from a lack of probable cause, is sufficient. *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App. 4th 613, 634, 124 Cal. Rptr. 2d 556 (2002) (citing *Downey Venture*, 66 Cal.App.4th at 498), *disapproved on other grounds by Zamos v. Stroud.* In *Swat-Fame*, that additional evidence was the deposition testimony of defendant Goldstein. In her testimony Goldstein admitted as true facts that she had alleged were false in her recently-filed complaint against Swat-Fame. When her complaint was dismissed, Swat-Fame brought suit for malicious prosecution. The court of appeal determined that the discord between Goldstein's two accounts, as well as her settlement tactics in the earlier litigation raised a material issue as to whether she "knowingly [brought] an action without probable cause." *Id. Swat-Fame* confirms our understanding of California law that the two elements--probable cause and malice-- are not only distinct but that "a lack of probable cause, standing alone, does not support an inference of malice." *Id.*[12]

For the reasons that follow, we conclude that--save for the abuse of process claim filed by David Kenner--the Tuckers' evidence did not create a triable issue of fact whether the Interscope or Kenner Defendants acted with malice in pursuing *Interscope v. Tucker* and *Death Row v. Tucker*. Although the Tuckers have not attempted to differentiate their evidence of malice as it relates to Interscope and Death Row as parties in the underlying litigation and to Ortner, Kenner, Thomas, and Paul Hastings as attorneys for the parties, we note that a party's malfeasance in initiating a lawsuit is not imputable to counsel. *See Zeavin v. Lee*, 136 Cal. App. 3d 766, 186 Cal.Rptr. 545, 548 (Ct. App. 1982). Nor are claims related to continuing such a lawsuit interchangeable for parties and attorneys.[13] We therefore separately consider the two groups of defendants.

B. Defendants Death Row and Interscope

The Tuckers first assert that they could prove malice to a jury because they have contested factual allegations made in the complaints in *Death Row v. Tucker* and *Interscope v. Tucker*. A "bare assertion that [defendants] 'fabricated' evidence" does not show malice. *Sangster v. Paetkau*, 68 Cal. App. 4th 151, 80 Cal.Rptr.2d 66, 75 (Ct. App. 1998); *see also* Fed. R. Civ. P. 56(e).[14] The Tuckers' evidence comprises only Mrs. Tucker's deposition testimony that the underlying cases were "lies, and that's the reason this [malicious prosecution] suit was filed," and similar statements by Mr. Tucker. These unsubstantiated assertions do not create a triable issue of fact regarding the existence of malice. Moreover, "the fact there may be *some* disputed facts relevant to the merits of the underlying action

does not by itself defeat a motion for summary judgment in a malicious prosecution action."*Sangster*, 80 Cal.Rptr.2d at 76.

The Tuckers also argue that the district court erred in granting summary judgment on the basis of lack of malice when there were genuine issues of fact regarding the existence of probable cause for some claims brought in the underlying litigation. But the fact that the district court found triable issues of fact as to probable cause for some claims, without more, is insufficient to survive summary judgment based on lack of malice. *See Paulus v. Bob Lynch Ford Inc.*, 139 Cal. App. 4th 659, 43 Cal.Rptr. 3d 148, 161 (Ct. App. 2006) ("Malice cannot be established simply by a showing of the absence of probable cause. . . ."); *Downey*, 78 Cal.Rptr.2d at 153-54 (holding that underlying claim's "lack[of] legal tenability . . . *without more*, would not . . . permit the inference [of malice]" and requiring that "the presence of malice . . . be established by other, additional evidence"). As explained above, malice requires proof of a defendant's subjective state of mind; a "conclusion that probable cause [as an objective inquiry] is absent logically tells the trier of fact nothing about the defendant's subjective state of mind." *Downey*, 78 Cal.Rptr.2d at 153. Even if we were to agree with the dissent that probable cause was lacking for many of the claims alleged in *Death Row v. Tucker* and *Interscope v. Tucker*, the evidence provided by the Tuckers is simply not probative of the subjective intent in filing the underlying lawsuits.

In *Padres*, the Court of Appeal concluded that the plaintiff established a *prima facie* case of malice[15] because, in addition to the lack of probable cause, the

defendant filed repeated actions against the plaintiff "in order to interfere with and/or derail" the plaintiff's business venture. 8 Cal.Rptr. 3d at 605. This evidence of subjective intent was *in addition to* the lack of probable cause and was sufficient to defeat summary judgment. *See id.* In *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 12 Cal.Rptr. 3d 786 (Ct. App. 2004), the court similarly found that the plaintiff had made a *prima facie* showing of malice sufficient to defeat the defendant's anti-SLAPP motion when it produced evidence that the defendant knew the underlying suit lacked any factual basis, took no depositions, and offered to accept $ 25,000 in exchange for dismissing the case. *Id.* at 796-97. "These facts could support a conclusion that [defendant] was simply trying to squeeze a settlement from [plaintiff] on a baseless case, and hence evidence of malice." *Id.* at 797.

The Tuckers argue that they, too, have produced evidence of malice with respect to Death Row and Interscope. Specifically, they rely on a two-page advertisement taken out in the October 1995 issue of *The Source*, a popular hip-hop magazine, which they characterize as "calling for Mrs. Tucker's elimination,"[16] and derogatory references to Mrs. Tucker in the songs "How Do U Want It" and "Wonda Why They Call U Bitch" on Tupac's 1996 album *All Eyez on Me*.[17] The Tuckers assert that a jury could infer from the ad and lyrics that Death Row and Interscope harbored hostility toward Mrs. Tucker and that they brought the underlying lawsuits for the improper purpose of chilling her anti-rap campaign.

We disagree because under California law malice is shown through evidence of "the subjective mental state

of the defendant *in instituting the prior action.*" *Downey Venture*, 78 Cal.Rptr.2d at 152 (internal quotation marks omitted) (emphasis added). This is not a case like *Padres*, where repeated actions were filed, or *HMS Capital* were no depositions were taken and questionable settlement tactics were pursued. Here, even assuming the Tuckers produced sufficient evidence from which a jury could connect the ad in *The Source* or Tupac's lyrics to either Interscope or Death Row,[18] such conduct occurred months after the suits were initiated and is simply not probative of either party's subjective intent in filing the underlying litigation. Placing an ad to promote Snoop Dogg's latest album, or calling out an individual in lyrics--even if done so in a shocking and degrading way-- does not present any of the "hallmark[s]" of a *lawsuit* brought for an improper purpose. *See Sierra Club, supra*, 72 Cal. App. 4th at 1157. Nor does *Zamos* address this question.[19] On this record, no California authority supports, nor could any reasonable finder of fact infer, that this post-filing conduct was probative of why the parties filed *Interscope v. Tucker* and *Death Row v. Tucker.*

The Tuckers next assert that a jury could infer improper purpose from the fact that Death Row and Interscope prosecuted the underlying lawsuits for three years without seeking a hearing on their claims for injunctive relief and then voluntarily dismissed the suits. In light of the Tuckers' own discovery delays, for which they were sanctioned, the mere fact that the litigation never progressed to a hearing or trial on the merits is insufficient to create a triable issue of fact regarding malice. Nor do the voluntary dismissals in *Death Row v. Tucker* and *Interscope v. Tucker* suggest that Death Row and Interscope initiated those lawsuits

believing their claims to be meritless. *Cf. Sierra Club*, 85 Cal.Rptr.2d at 740 (rejecting argument that post-dismissal settlement was "[ ]relevant to the issue of [defendant's] state of mind for purposes of the malicious prosecution"). The Tuckers produced no evidence to undermine Defendants' explanation that they dismissed *Death Row v. Tucker* and *Interscope v. Tucker* upon the termination of their contractual relationship, at which point most of the underlying claims for injunctive relief became moot and the underlying claims for damages, given that the Tuckers were judgment-proof, became futile. Nor could a jury reasonably infer that the statements in the Defendants' motions that the Tuckers were judgment-proof were somehow "window-dressing meant to disguise the absence of any fact supporting the outrageous claims asserted." Dissent at 1832. To the contrary, the California Court of Appeal has encouraged timely dismissals, noting that:

> the law favors the early resolution of disputes, including voluntary dismissal of suits when the plaintiff becomes convinced he cannot prevail or otherwise chooses to forego the action. This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action.*Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 264 Cal.Rptr. 883, 897-98 (Ct. App. 1989) (citation omitted).

Finally, the Tuckers assert they can demonstrate malice on the ground that Interscope named only Mrs. Tucker (and Atlantic Ventures nominally) as a defendant. Given that the strongest evidence

supporting Interscope's claims was the August 7 letter bearing Mrs. Tucker's name, the decision to name only Mrs. Tucker rather than other members of the NPC and its Entertainment Commission reflects a prudent litigation decision and is not evidence that the parties knowingly brought an action without probable cause or that they harbored especial ill will towards Mrs. Tucker.

In sum, we agree with the district court's legal conclusion that the Tuckers did not produce sufficient evidence from which a jury could infer that either Death Row or Interscope pursued the underlying litigation out of malice.

C. Attorney-Defendants Ortner, Thomas, Kenner, and Paul Hastings

To show that attorney-Defendants Ortner, Thomas, Kenner, and the law firm of Paul Hastings acted with malice in pursuing the underlying litigation on behalf of their clients, the Tuckers must do more than rely on the evidence relating to Death Row and Interscope's own purposes in initiating *Death Row v. Tucker* and *Interscope v. Tucker*. *See Zeavin*, 186 Cal.Rptr. at 548 (rejecting the "argument of joint liability of attorney and client for the conduct of each other where both are joined as defendants in a malicious prosecution action" and noting that "the client is not the agent of his attorney"); *see also Morrison v. Rudolph*, 103 Cal. App. 4th 506, 126 Cal.Rptr.2d 747, 752 (Ct. App. 2004) ("'Usually, the client imparts information upon which the attorney relies in determining whether probable cause exists for initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for

exercising judgment and providing advice, unless the client's representations are *known* to be false.'" (quoting Mallen & Smith, *Legal Malpractice* (5th ed. 2000) § 6.19, p. 620) (emphasis added)), *disapproved of on other grounds by Zamos*, 87 P.3d at 802. To ultimately prevail against any of the attorney-Defendants, the Tuckers must show "other, additional evidence" that demonstrates the attorney's own malice or knowing lack of probable cause. *Swat-Fame*, 101 Cal. App. 4th 613 at 634, 124 Cal. Rptr. 2d 556 (citing *Downey Venture*, 66 Cal. App. 4th at 498); *see also Ross v. Kish*, 145 Cal. App. 4th 188, 51 Cal.Rptr. 3d 484, 497 (Ct. App. 2006) (holding that "because the evidence suggests [the attorney-defendant] knew the claims for breach of contract and legal malpractice lacked factual and legal support[,] . . . a trier of fact reasonably could infer [the defendant-attorney] filed the action with malice").

1. Kenner and the Claim for Abuse of Process

With respect to the abuse of process claim in *Death Row v. Tucker*, the Tuckers have raised a triable issue of fact under the above standard. A reasonable fact-finder could infer from Kenner's drafting of the complaint that Kenner knew the abuse of process claim lacked merit.[20] In drafting the complaint, Kenner alleged that Mrs. Tucker's "wrongful use of the criminal and civil justice system" was an abuse of process under California state law. The only fact in the complaint to support that allegation was that "[Suge] Knight was specifically threatened that as a result of [Tucker's] power and influence that [he] would spend the rest of his life in jail." Even if Kenner sincerely relied on his client's representations that such a threat was made by

Tucker, Kenner's use of that allegation to state an abuse of process claim provides a triable issue as to whether Kenner did so with malice.

This is because under well-established California law, the tort of abuse of process "requires misuse of a *judicial* process." *Stolz v. Wong Communications Limited Partnership*, 25 Cal. App. 4th 1811, 1822 (Ct. App. 1994). It is a process that is "pursuant to authority of [a] court." *Meadows v. Bakersfield Sav. & Loan Ass'n.*, 250 Cal. App. 2d 749, 59 Cal.Rptr. 34, 37 (Ct. App. 1967); *see id.* ("[T]he essence of the tort 'abuse of process' lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice."); *see also* 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 517, pp.767-68. To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the judicial process, and (2) committed "a willful act in the use of th[at] process not proper in the regular conduct of the proceedings." *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202, 1209 (Cal. 1986). Misuse of an administrative proceeding--even one that is quasi-judicial--does not support a claim for abuse of process. *Stolz*, 25 Cal. App. 4th at 1823-25 (noting that there is "no authority" that extends the tort to administrative proceedings). Nor is there any authority--Kenner's citation to *Standing Committee on Discipline v. Ross* not withstanding--that threats made outside of the judicial process can form the basis for an abuse of process claim. *See* Ross, 735 F.2d 1168, 1170 (9th Cir. 1984) (threatening criminal charges to obtain

an advantage in an ongoing civil action subjected lawyer to disciplinary proceedings).

Here, in drafting the abuse of process claim, Kenner relied on vague language about "wrongful use of the criminal and civil justice system" despite clearly established law that requires misuse of a *court* process.[21] Moreover, he supported the claim with the mere factual assertion that Tucker would use her "influence" to ensure that Knight went to jail. These circumstances raise a genuine triable issue of fact as to Kenner's "*subjective* mental state . . . in instituting the [claim]." *Downey Venture*, 78 Cal.Rptr.2d at 152. A fact-finder could reasonably infer from Kenner's drafting of the complaint that he did not believe the claim was valid when filed, or that the claim was instituted for an improper purpose.[22]

2. Ortner, Thomas, Paul Hastings and the Remaining Claims against Kenner

With respect to Ortner, Thomas, Paul Hastings, and the remaining claims against Kenner, the Tuckers fail to pinpoint how any of the evidence in the record suggests that any of the attorney-Defendants filed *Death Row v. Tucker* and *Interscope v. Tucker* for a purpose other than honoring their clients' wishes. The Tuckers have not shown, with respect to these remaining claims, that the attorneys affirmatively knew that the factual bases for the underlying suits to be false at the time the suits were filed, *cf. Morrison*, 126 Cal.Rptr.2d at 752. Nor have the Tuckers shown that any attorney-Defendant continued to prosecute any of the remaining claims after learning that they were not supported by probable cause. *Zamos*, 87 P.3d at 810. Given this lack

of evidence, the district court correctly concluded that no reasonable trier of fact could find that the attorney-Defendants, with the exception of Kenner's claim for abuse of process, acted with malice when they filed the underlying litigation on behalf of Death Row and Interscope.[23]

V.

Loss of Consortium

Mr. Tucker's claim for loss of consortium was derivative of his wife's cause of action for malicious prosecution. The district court granted summary judgment in favor of all the Kenner and Interscope Defendants, in part, on the basis that Mr. Tucker's claim was tied to the malicious prosecution claims, which the court determined did not survive summary judgment. Were this the only basis for the court's disposition of this claim, reversal might well be warranted because we have concluded that the malicious prosecution claim must proceed as to Kenner. *See Snyder v. Michael's Stores, Inc.*, 16 Cal. 4th 991, 68 Cal. Rptr. 2d 476, 945 P.2d 781, 785 (Cal. 1997) ("One spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse.").

However, the district court also reached the merits of Mr. Tucker's claim and concluded on the limited evidentiary record that, "the harm . . . is more akin to a loss of society and companionship than the type of longstanding and debilitating impairment to the relationship necessary to support a loss of consortium." We can affirm the district court's grant of summary judgment on any basis supported by the record, and we

agree.

To support a loss of consortium claim, marital spouses must allege that their partner suffered an injury that is "sufficiently serious and disabling to raise the inference that the conjugal relationship is more than superficially or temporarily impaired." Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813, 823 (Cal. 1980); *Anderson v. Northrop Corp.*, 203 Cal. App. 3d 772, 250 Cal.Rptr. 189, 195 (Ct. App. 1988) (same). The injury may be physical or psychological, but psychological injury must "rise[ ] to the level of a 'neurosis, psychosis, chronic depression, or phobia' [to be] sufficient to substantially disturb the marital relationship." *Anderson*, 250 Cal.Rptr. at 195, quoting *Molien*, 616 P.2d at 813.

We agree with the district court that Mr. Tucker's testimony does not raise a triable issue as to psychological injury sufficiently serious or disabling as to raise an inference that his relationship with his wife was more than superficially impaired. Therefore, the district court properly granted Defendants' motion for summary judgement as to Mr. Tucker's loss of consortium claims.

VI.

Conclusion

With the exception of the abuse of process claim where the Tuckers raised a triable issue as to Kenner's malice, the Tuckers did not produce evidence from which a jury could find malice, which is a necessary element of the malicious prosecution claim. Although Mrs. Tucker's

estate may be entitled to recover damages for malicious prosecution, the district court appropriately granted summary judgment for the Kenner and Interscope Defendants with respect to Mr. Tucker's cause of action for loss of consortium. We therefore affirm the district court's grant of summary judgment in *Tucker v. Interscope*, No. 05-56045, and affirm in part and reverse in part the district court's grant of summary judgment in *Tucker v. Kenner*, No. 06-53376.

05-56045 AFFIRMED.

06-53376 AFFIRMED in part; REVERSED in part; REMANDED.

In 05-56045, Defendants shall recover their costs on appeal.

In 06-53376, the parties shall bear their own costs on appeal.

DISSENT BY: NOONAN

DISSENT

NOONAN, Circuit Judge, concurring and dissenting:

The legal question to be decided is whether Tucker presented sufficient evidence to create a triable issue of material fact as to whether Death Row and Kenner had sued her with malice when they began and continued a suit against her charging her with racketeering involving extortion, mail and wire fraud; intentional interference with contract; and abuse of process, and whether there was sufficient evidence of malice to go to

a jury as to whether Interscope, Ortner, and Paul, Hastings had acted with malice when they began and continued a suit against Tucker in which she was charged with conspiracy, disrupting a contract, depriving Interscope of property and extortion. The standard of review is that all inferences are to be drawn in favor of Tucker, the nonmoving party. It is evident, I believe, that Tucker submitted sufficient evidence to defeat the summary judgments in favor of Death Row Records, Interscope, Kenner, Ortner and Paul, Hastings. A statement of the facts, followed by a statement of the law will show the basis for this contention.

FACTS

The Cast of Principal Characters. The plaintiff, C. Delores Tucker (Tucker), was a person of prominence in the African American community, in the Democratic Party, and in the Commonwealth of Pennsylvania. In the 1970's, she was Secretary of State of the Commonwealth -- the first woman and the first African American to serve in this office. She served as Chair of the Democratic National Committee Black Caucus. She was the first African American president of the National Federation of Democratic Women. She crossed the path of the defendants by her concern over the popularity and promotion of gangsta rap and the impact of gangsta rap upon the behavior of black youths and upon the reputation of the black community. In 1995, she was 68 years-old.

Dionne Warwick (Warwick) had an established reputation in rhythm and blues, soul, and soft contemporary music. Warwick's public service included

raising money for AIDS research, serving as the American Ambassador for Health in the 1980's, and acting as global ambassador for the UN's Food and Agriculture Organization in 2002. Her music reached a wide public and struck a note very different from that of gangsta rap, as in her signature song "Walk On By":

> If you see me walking down the street
> And I start to cry each time we meet
> Walk on by, walk on by
> Make believe that you don't see the tears
> Just let me grieve in private 'cause each time I see you
> I break down and cry

Death Row Records (Death Row), founded in 1991, is the producer of gangsta rap and other music. Its revenues are estimated to have been $ 900,000 in 1993 and to have been $ 33,000,000 in 2002. It is currently in bankruptcy. Its cofounder and CEO in the period 1993-1998, when the events relative to this litigation occurred, was Suge Knight. Death Row signed some of hip-hop's biggest stars, including Tupac Shakur, and dominated the rap industry in the mid-1990's. The company came to represent the West Coast rap movement in the emerging East Coast-West Coast rap rivalry that eventually led to the murders of Tupac Shakur in 1996 and Tupac's East Coast rival rapper, Biggie Smalls in 1997. At the time relevant to this litigation, Death Row had a distribution agreement with Interscope Records.

Marion "Suge" Knight, Jr. (Knight) was 28 years-old in 1993. He had been charged with and pled no contest to auto theft, possessing a concealed weapon, attempted

murder, assault, and battery with a deadly weapon. He was convicted of assault in 1992 and placed on probation. In 1996, he was sentenced to nine years in prison for parole violation. Knight's criminal career after dates relevant to the litigation is omitted.

Interscope Records was a California general partnership consisting in 1993-1995 of Interscope Records, Inc. and Atlantic Ventures, an affiliate of Time Warner.

Time Warner is a media and communications company whose principal place of business is New York. Its total assets in 1995 were $ 3.72 billion. At the start of the underlying suits, Time Warner owned a 50 percent share of Interscope Records through its affiliate Atlantic Ventures.

David Elliot Kenner (Kenner) was in 1995 a 53 year-old lawyer, a graduate of the law school of the University of Southern California, engaged in the solo practice of law in Encino, California.

Charles B. Ortner (Ortner) was 50 years old in 1995, had graduated from Brooklyn Law School, and was an attorney with Paul, Hastings.

Paul, Hastings, Janofsky & Walker (Paul, Hastings) is a large law firm headquartered in Los Angeles and has 17 other offices around the world employing 1200 attorneys.

Events. In 1993, when Tucker was the Chair of the National Political Congress of Black Women (the NPC), she listened to the plea of Warwick and Melba Moore,

another well-known African American performer, to do something about "what's going on in Hollywood about our young people calling us whores and bitches and disrespecting and denigrating African American women." Tucker followed up by checking on whether this stuff was sold to children. If it was, she was going to "put my marching shoes back on that I marched with Dr. Martin Luther King hand in hand in Selma." The stuff was sold to children. Tucker began marching.

As president of the NPC, Tucker enlisted Warwick, Moore, Voncier Alexander, and Terri Rossi to form an Entertainment Commission, whose Mission Statement ran as follows:

> The goals of the National Political Congress of Black Women, Inc. (NPCBW) Entertainment Commission (NPCBW Entertainment Commission) are threefold:
>
> - Seek to eliminate internal blockage in the industry that currently and most obviously prevents African Americans from the achievement of equal opportunities as artists and those positions of decision making.
>
> - Mobilize African Americans in the industry to join the struggle to resolve critical issues affecting African American communities, particularly in the areas of education and health, where so many serve as role models and spokespersons.

- Offer strategies and solutions of reshaping and maintaining positive images to preserve the dignity and heritage of our youth . . . *instead* of continuously exposing our youth to negative media that distort their images of male/female relationships, undermines the stability of our families, communities and nation by encouraging violence, abuse and sexism as acceptable behaviors, and perpetuates the cycle of low self-esteem of African American youth.

Tucker's march had just started. She demonstrated outside a Tower Records store to protest its sale of albums of gangsta rap to minors. She gained support for her cause from a broad spectrum of national leaders, including William Bennett, Joe Lieberman, Tipper Gore, Bob Dole, and Sam Nunn. She testified before the Federal Communications Commission and before committees of Congress on the harm done by gangsta rap. She attended a Time Warner stockholders' meeting where she offered the corporation's executives $ 100 if they would read gangsta rap aloud to the meeting. In short, Tucker using the skills and smarts of a woman knowledgeable about political endeavors and media responses, took advantage of the democratic processes available to aroused citizens, and made herself a terrific nuisance to a principal producer of gangsta rap, Death Row.

On July 7, 1995, the NPC convened its biennial convention in Seattle. Suge Knight and Kenner as Death Row's lawyer met with Tucker and others. They discussed the formation of a distribution company

owned by blacks that could distribute Death Row Records if Suge Knight eliminated the gangsta rap.

On August 7, 1995, Tucker and others drafted a letter for Knight's signature, memorializing the July 7 meeting. In the letter, Knight stated that Death Row "will cease and desist from the production and distribution of misogynist, obscene and pornographic music," a preliminary condition for Knight's authorization of NPC "to negotiate an acceptable contract relationship with Time Warner Inc. regarding the production and distribution of our music products." This letter was unsigned and delivered to Knight. The next day, August 8, Warwick arranged a meeting attended by about ten persons, some of them NPC members, not including Tucker, and four persons from Time Warner. Michael Fuchs, an executive of Warner Music, wanted to know if Knight had a contract with Interscope to distribute his records. Fuchs had flown from New York to meet Knight and "the purpose of the meeting was for [Fuchs] to sort of grill Suge Knight on his involvement or his relationship with Interscope." Knight had been invited, but wasn't there. He telephoned repeatedly from 11:00 A.M. to 4:00 P.M. to say he was on the way.

Knight spent the day with his lawyer, Kenner, and James Iovine, then the President of Interscope Records.

The following day, August 9, Kenner drafted a letter signed by Kenner and Knight and addressed to Dionne Warwick. The letter rejected the draft letter sent to Knight, affirmed his position to stand by his music and musicians, and stated that Tucker had misunderstood

him or was misrepresenting what he had said. The letter also rejected what it described as "Mr. Fuchs' offer, as conveyed to Mr. Knight, of an $ 80,000,000 advance and to provide him with two studios if he would agree to sign directly with Time Warner."

Kenner then conferred with Ortner, counsel for Interscope. On August 15, 1995, Ortner filed a complaint on behalf of Interscope against Tucker in the Central District of California. The complaint alleged that beginning in mid-1995, for her own "personal and financial gain," Tucker "together with others whose identities are [ ] unknown," engaged in a conspiracy to destroy Interscope by "committing extortion, threats, and other unlawful acts." Interscope's partner, the Time Warner affiliate, was also named but characterized as "a nominal defendant."

The first claim of the complaint was that as a result of Tucker's actions, "the contractual relationship between Interscope and Death Row Records has been disrupted." The second claim sought a preliminary and permanent injunction against these acts. The third claim was for such injunctions against Tucker attempting to induce Time Warner and its affiliate Atlantic Ventures to breach their fiduciary duty to Interscope. The fourth claim sought similar injunctions against Tucker engaging in unfair business practices and unfair competition, by reason of which "Interscope has incurred irreparable harm and has been deprived of its property rights." Compensatory, exemplary, and punitive damages were sought on each claim, along with reasonable attorneys fees. The complaint carried the name of three lawyers and the firm name of Paul, Hastings. It was signed in Ortner's name.

Two days later, on August 17, 1995, Kenner on behalf of Death Row also filed in the Central District a complaint against Tucker; the NPC; Time Warner; the Warner Music Group; Michael Fuchs; and Gerald Levin for "multiple violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961-68, as well as various other violations of federal and state laws." The allegations against Tucker were stated to be against her as an individual and as "a representative or officer of [the NPC]." Fuchs was identified as chairman of Warner Music and Levin as chairman of Time Warner. The defendants were alleged to be in a conspiracy "to enrich the Defendants themselves." The defendants were said to have engaged in their unlawful scheme "[f]or the past 13 months," that is, since July, 1994. Their acts began with "a smear campaign." "This campaign, primarily directed toward Defendant TIME WARNER, was and is an apparent attempt to induce action through political pressure." Tucker "did not disclose her ulterior motive to replace and supplement Interscope Records as the distributer of the recorded output of Death Row Records. This commercial goal was hidden and obscured by Defendant TUCKER." Among the acts charged against Tucker personally was her picketing of a Time Warner stockholders' meeting, her denouncing Time Warner "for their support of music containing 'explicit' lyrics, and its alleged denigration of African-American women." Tucker's recruitment of William Bennett and Bob Dole to her cause was also alleged against her.

The first cause of action set out was racketeering in violation of 18 U.S.C. § 1962(b) and (c). Tucker, the NPC "and others" unknown were said to have formed an enterprise to establish "a record distribution

company controlled by Defendant TUCKER." The enterprise was attempting to secure its objective by a "pattern of racketeering activity." The predicate criminal acts included extortion, that is, an attempt to obtain property from Death Row Records "by a wrongful use of force or fear against Knight" resulting in "actual," although unknown, damages to Death Row. Mail fraud in violation of 18 U.S.C. § 1841 was another part of the pattern, a crime carried out by the draft letter proposed for Knight's signature on August 7, 1995. Wire fraud in violation of 18 U.S.C. § 1343 was also part of the pattern, the fraud consisting in unspecified uses of "the wires, radio, or televison communications" with the result of actual, but unknown, damage to Death Row. The defendants were further charged with criminal interference with interstate commerce in violation of 18 U.S.C. § 1951-2, a crime alleged to have been committed simply "by transporting persons and things in interstate commerce" in furtherance of their scheme. A final element of the unlawful pattern was the conspiracy of the defendants to achieve their unlawful end.

The second cause of action alleged conspiracy in violation of 18 U.S.C. § 1962(d) and sought treble damages for unspecified harm. The third cause of action alleged a "conspiracy to interfere with advantageous business relationships" broadly said to be "in violation of federal and state law." The fourth cause of action was for intentional interference with contract and prospective business advantage. The fifth cause of action made "extortion" its gravamen. The sixth cause of action was "unfair business practices"; the seventh was "abuse of process," by the defendants "threatening to fabricate and pursue a course of conduct designed to

cause criminal and civil liability to Knight," a crime amounting to "wrongful use of the criminal and civil justice system."

Death Row sought an injunction against all the defendants, treble damages for the first and for the second causes of action, and compensatory, exemplary, and punitive damages for all causes of action.

In October 1995, two months after the litigation began, an ad appeared in *The Source*, a hip-hop magazine, listing twelve black freedom fighters such as Martin Luther King, Jr. and Nelson Mandela. To this list a thirteenth name had been added, that of Tucker. A red line was drawn through this name. At the bottom of the ad were two quotes. The first was attributed to Martin Luther King, Jr.: "When we let freedom ring, . . . we will be able to speed up that day when all of God's children . . . will be able to join hands and sing . . . 'Free at last! Free at last! Thank God Almighty, we are free at last.' " A second quote followed under this first one. Underneath this paragraph and parallel to it were these words: "Whether it's freedom for our people or freedom for our people to say what's on their minds the fight lives on . . . ." Following this quotation, its author was identified as "Suge Knight, CEO of Death Row Records.

On October 4, 1995, Kenner wrote counsel for Tucker, stating "Death Row, because of the actions of the parties, including your clients, has been damaged and Death Row Records has every right to proceed to have their case heard without delay." Death Row and Interscope made demand for the production of documents including "without limitation, any

communication, notes of conversations, correspondence, contracts, proposals, drafts and/or memoranda . . . that reflect, refer, or relate to Interscope, Death Row and/or rap music" and "[a]ll of your personal and business telephone records, logs, messages and related documents, for the period of January 1, 1995 to the present." In their capacity as plaintiffs, they also took Tucker's testimony for four days of depositions. A month later, they took another four days, so that the total testimony came to 1,700 pages contained in eight volumes. In 1996, approximately thirteen months later, they took another three days of depositions from Tucker, adding three more volumes to the total.

In February 1996, Death Row produced and Interscope distributed an album sung by Tupac Shakur. One song, "How Do U Want It?" asked:

> Now tell me is it cool to fuck?
> Did you think I came to talk?

The rapper went on in the course of his song to say:

> Delores Tucker, yous a muthafucka,
> Instead of trying to help a nigga you
> Destroy a brotha, worst than the others,
> Bill Clinton, Mr. Bob Dole, you too old
> To understand the way the game's told.
> You lame soul, I got to hit you with the high facts.
> When some release makin' millions . . . .

A second song on the album, "Wonda Why They Call U Bitch," concluded:

Dear Ms. Delores Tucker, you keep stressin' me,
Fuckin' with a motherfuckin' mind.
I figured you wanted to know, you know,
Why we call them ho's bitches.
Maybe this might help you understand.
It ain't personal.
It's strictly business, baby, strictly business.
So if u wonda why we call u bitch
U wonda why we call u bitch
If u wonda why we call u bitch,
U wonda why we call u bitch.

Trial was finally set, for October 27, 1998. On June 1, 1998, Death Row filed a notice of motion to dismiss its entire action. The reasons given were that Death Row and Interscope had severed their relationship and Death Row no longer needed injunctive relief to protect it and that investigation had shown that Tucker and the NPC lacked money to satisfy the damages to which Death Row was entitled. Interscope also moved for dismissal of its action. On June 18, 1998, the motions were granted.

PROCEEDINGS

Judge Paez's opinion accurately states the beginning and course of the two cases now consolidated for decision. Tucker died at the age of 78 in 2005; her husband, William Tucker, is now her personal representative. Death Row is in bankruptcy, and its bankruptcy estate is being managed by a court-appointed trustee.

The district court's ruling in the Kenner case was as follows:

> While the court notes that Kenner lacked probable cause to pursue a claim of abuse of process in the underlying litigation, the evidence Plaintiffs offer in addition to this finding is insufficient to show that Kenner acted with malice. Plaintiffs have offered no evidence to support their allegation that Kenner knew no threats were levied against his client. Moreover, Plaintiffs' assertion is inconsistent with Kenner's deposition testimony as well as Mrs. Tucker's admission that she did contact the Justice Department and the FBI regarding Death Row Records. Lastly, Plaintiffs' allegations about Kenner's conduct during the course of litigation amount to nothing more than mere speculation and fail to demonstrate actual hostility or ill will. A reasonable jury could not return a verdict in Plaintiffs' favor on this evidence. As such, summary judgment is warranted as to this issue.

The district court added:

> Defendant Kenner also seeks clarification as to the court's ruling regarding probable cause and favorable termination. The court advises Defendant that genuine issues of fact existed as to both issues which precluded a finding as a matter of law in his favor.

In the Interscope case, the court found that genuine issues of material fact remained as to Interscope Records' probable cause for inducement to breach contract and inducement to breach fiduciary duty as well as Death Row's probable cause to file claims for RICO violations, extortion, and abuse of process.

ANALYSIS

In these diversity cases, it is uncontested that California law should govern. We consider them separately except to note that both suits brought by the defendants against Tucker terminated in her favor. A necessary element of a case for malicious prosecution is judgment against the plaintiffs in the suits that they maliciously launched. Under California law a voluntary dismissal accepted by the court constitutes such a judgment even though the phrase "with prejudice" is not added to the dismissal. *Fuentes v. Berry*, 38 Cal. App. 4th 1800, 1808, 45 Cal. Rptr. 2d 848 (1995).

Tucker v. Kenner. On the evidence presented by Tucker, a jury could conclude that Kenner lacked probable cause and filed and pursued Death Row's action against Tucker and the NPC with malice.

First, as to the objective lack of probable cause: The district court has already ruled that there are triable issues of fact as to probable cause. Death Row and Kenner have not appealed that ruling. It may, therefore, seem to be a work of supererogation to review the counts of the Death Row complaint in terms of their lack of any foundation in fact. That, however, is not the case. Lack of probable cause can be an element in the proof of malice. Even more significantly, *knowledge* of the lack of probable cause is itself proof from which a jury may infer malice. *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App. 4th 613, 634, 124 Cal. Rptr. 2d 556 (2002). Reasons exist, therefore, to review the lack of probable cause for many of the claims of the quondam plaintiffs and the likelihood that the claims were knowingly brought without cause.

First, after three years of investigation, discovery, and deposition-taking, Kenner voluntarily withdrew Death Row's action against Tucker, including the claims that she had committed a variety of federal and state crimes. A jury could reasonably infer that the stated reason that Tucker and the NPC were judgment-proof was window-dressing meant to disguise the absence of any fact supporting the outrageous claims asserted. Second, a jury could make an inference from the difference between the Interscope and Death Row complaints. Although both companies and their lawyers were in communication in preparing their respective suits, and although both corporations had the same information about Tucker and the same reasons to hate her, Interscope did not charge Tucker with racketeering. If there were any evidence of racketeering in possession of Death Row, a jury could infer that it would have been shared with Interscope. The absence of racketeering charges in Interscope's complaint would permit a rational trier of fact to conclude that, more probably than not, Death Row and Kenner knew no facts to support their racketeering claims. Third, a jury could also infer from the extraordinary vagueness of several of Death Row's criminal charges that Kenner was merely using boiler plate without possession of any facts on which to act. A trier of fact could consider, for example, the failure to identify any actual harm caused by the conduct complained of; the utterly unspecified reference to "uses" of "the wires"; the strange charge of criminal interference in interstate commerce by the transport of "persons and things." Fourth, a jury could also infer that the racketeering charges against the NPC were without any foundation and without any purpose except to make out Tucker as a scheming and

faithless fiduciary who would manipulate an educational group for her own private profit.

Fifth, the district court has ruled as a matter of law that Kenner lacked probable cause to bring the claim for abuse of process. This ruling has not been appealed and is the law of the case. A jury could infer that if Kenner lacked probable cause so did Death Row. Further, a jury could infer that Kenner knew there was no probable cause for this claim. As a lawyer, Kenner must have known that an abuse of process "is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice," and thus, the essence of an abuse of process claim "lies in the misuse of the power of the court." *Meadows v. Bakersfield Sav. & Loan Ass'n*, 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34 (1967). Tucker had brought no suit against his client. A jury could well infer that the knowing assertion of this claim manifested malice.

Similarly, an action for intentional interference with contract requires an *actual* breach or disruption of the contractual relationship. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 77 Cal. Rptr. 2d 709, 960 P.2d 513, 530 (Cal. 1998). The absence of any evidence of an actual breach could allow a jury to infer that Kenner knowingly brought and continued Death Row's actions without probable cause.

Finally, that the August 7, 1995 letter authorized the NPC, and not Tucker, to "negotiate an acceptable contract relationship" on behalf of Death Row suggests that Tucker could not have harbored a ulterior motive of personal enrichment as alleged in Death Row's complaint. A jury could infer from this letter that

Kenner had no probable cause and therefore harbored malice in attributing hidden motives to Tucker where no such evidence existed.

As to evidence from which a rational trier of fact could infer malice, *Swat-Fame*, 101 Cal. App. 4th at 634, shows that the *knowing* bringing of a baseless claim is sufficient for a jury to conclude that a case was brought maliciously. Second, the charges against Tucker evince hatred. A 68 year-old civic leader is charged with a spate of offenses that would be appropriate to an indictment of a mafioso. She is an extortionist and a racketeer. She has organized a racketeering enterprise to enrich herself. Malice gleams from Death Row's complaint.

Third, the allegations in the complaint specifically set out the criminal conduct charged to Tucker as beginning in 1994. In their brief on appeal the defendants acknowledge that Tucker had a perfect right under the First Amendment to agitate against gangsta rap and to ask others to join in her cause. That is precisely what she was doing in 1994. Not even a shred of evidence exists to show that this veteran of the civil rights movement was acting for her personal profit on any occasion in 1994. What Tucker was doing, both in 1994 and in 1995, a jury could find, was what Bob Dole, Tipper Gore and Joe Lieberman were doing -- telling Time Warner and its affiliate, "Get this stuff off the air. You should be deeply ashamed. You are maligning women. You are promoting law-lessness. You are denigrating an entire ethnic community. For heaven's sake and for the sake of your own reputation, get out of it." Warwick, a deeply respected singer, had taken the lead. Yet Tucker alone was charged with

racketeering and a pattern of racketeering reaching back to the period of her acknowledged First Amendment activity. Her profit-seeking motive is alleged to have been "hidden." A jury could conclude that a hidden motive was an imagined motive, a motive maliciously conjured up to bolster Death Row's complaint. Only malicious minds, a jury might decide, could so construe her tough-minded and democratic strategy.

Fourth, former education Secretary William Bennett is named as a recruit of Tucker. His recruitment is an asserted part of the pattern of racketeering. The dogged determination to do in Tucker is manifestly malicious when her wooing of a senior American political leader is asserted to constitute criminal behavior.

Fifth, the complaint alleged that Levin, the CEO of Time Warner, and Fuchs, the CEO of Warner Music, were engaged in the racketeering conspiracy to enrich Tucker. The sheer implausibility of this claim, unsupported by any specific allegations, could lead a jury to infer malice. Hate-filled malignancy, a jury could infer, had led to the fantastic supposition that a multi-billion dollar corporation sought to enrich Tucker by cooperating in her racketeering.

Sixth, a jury could infer malice from the way Death Row and its counsel conducted the case -- first asserting a need for a prompt trial but at no point moving for a restraining order or preliminary injunction; besieging Tucker with an oppressive demand for discovery; harassing Tucker with days of deposition-taking, while taking very little deposition

testimony from Warwick, who participated in the August meeting; and taking no depositions from Fuchs and Levin, alleged to be Tucker's partners in crime.

Seventh, three publications outside of the Death Row complaint shed light on Death Row's motives. The first is the ad in *The Source*. Tucker believed that the ad called for her death. She was deposed as to the pain it caused her and the precautions she felt obliged to take to prevent being killed. No direct evidence was submitted establishing that Death Row paid for the ad. A jury could take into account two facts: (1) The concluding quotation was ascribed to Knight in his corporate capacity. This quotation is paired with the quotation of Martin Luther King, Jr.; (2) Knight had reason to hate Tucker. This full page ad improbably put Knight on par with King, pointedly identified Knight as Death Row's CEO, and marked Tucker, at least symbolically, for destruction. The inference could rationally be drawn that the ad was inserted in *The Source* by Death Row and was significant evidence of its malice as it continued its suit against Tucker. The two songs made by Tupac under the Death Row record label during the litigation demonstrate the strongest antipathy to Tucker, who is assailed in vile language. A jury could well conclude, If this evidence does not exhibit malice, what would?

Kenner is not personally responsible for the ad or the lyrics. He is responsible for setting out the malicious imaginings of a client with such hate, or so a jury could conclude. Kenner could be held responsible for the irresponsible assortment of criminal charges in the complaint against Tucker that he drafted and filed. Despite his extensive experience with the criminal law,

Knight does not appear to have had the education necessary to conceive of the RICO charges and to express Tucker's alleged crimes in words fitted to the statutory provisions invoked. A jury could well conclude that the special malice of the racketeering allegations owed their origin and presentation to the knowledge and skills of Kenner. An attorney cannot escape liability by saying, "I was only a hired gun. My client and its CEO may have been malicious, but I was not." Kenner could be found to have begun and continued the suit sharing the malice of his client and to have expressed malice in the drafting of the complaint.

It is argued that the ad in *The Source* and Tupac's lyrics are not evidence of malice at the start of the suit because they appeared after the suit was started. For two reasons, this argument is unconvincing. First, a jury could well infer that the hatred of Tucker displayed in the ad and in the lyrics was not a sudden development arising out of the suit, but the overt demonstration of what had smouldered and been fueled by anger at Tucker's campaign against gangsta rap. Second, it is good California law that malice in continuing a lawsuit is as actionable as malice in originating it. *Zamos v. Stroud*, 32 Cal. 4th 958, 12 Cal. Rptr. 3d 54, 87 P.3d 802, 810 (Cal. 2004). The ad and the lyrics demonstrate malice in the prosecution of the suit.

It has been suggested that the ad can be read as the personal act of Suge Knight, not of Death Row. Again that argument cannot be sustained. First, Knight's corporate title was used to identify him. Second, Knight -- as far as this record shows -- was Death Row. When he appears in the record, he is bargaining, complaining, negotiating for Death Row without reference to its

directors or to any corporate control. He is it, or so a jury could reasonably infer.

It has been suggested that Death Row is not responsible for Tupac's lyrics. The suggestion is one possible reading of the evidence. But a jury could reasonably infer that the extraordinarily pointed references to Tucker did not arise out of any special animus against her on Tupac's part but were designed by Death Row and its CEO to bring their adversary into a public pillory.

Tucker v. Interscope, Death Row, Ortner, and Paul, Hastings. Tucker sued Interscope, Death Row, Ortner and Paul, Hastings on five grounds that have been winnowed in the course of its action and an appeal consists in a single claim of malicious prosecution. Again, it is desirable to examine the elements of the claim that consist in the lack of probable cause as well as the presence of malice. A jury could infer Death Row's malice and lack of probable cause from the same evidence showing Kenner's malice and lack of probable cause, as discussed earlier. What of the acts of Interscope taken by itself and of the lawyers representing Interscope in the litigation against Tucker?

Interscope's complaint alleged that Tucker was a conspirator engaged in extortion and other unlawful acts for her own profit. The few facts stated in the complaint focused on hazy and inconclusive accounts of the July 1995 meeting and on accounts of the August 1995 meeting held by Warwick from which Knight, Kenner, and Tucker were all absent. A jury could infer that not only was probable cause lacking for these

baseless charges, but that Interscope and its lawyers, Ortner and his firm, knew that the charges were baseless.

Second, a theory of both complaints was that Tucker was using her leverage with Time Warner, no doubt sensitive to adverse publicity, to break Interscope's contract with Death Row. In fact, however, in September 1995, less than two months afer the complaints were filed, Time Warner terminated the only investment it had in the joint venture with Interscope. Despite the absence now of any channel by which Tucker could affect Death Row's relation to Interscope, the suit continued for three years without a foundational fact.

Third, the plaintiffs lined up against Tucker were Death Row and Interscope. Yet she was alleged to be disrupting their relation. The improbability of the two plaintiffs being set against each other by Tucker would permit a jury to infer that the suits were continued after they had lost even a smidgen of probability.

Fourth, the claim that the Interscope-Death Row relationship had been disrupted was palpably untrue. The contract between them had not been breached. Their counsel, Ortner and Kenner, worked hand and glove together, or so the jury might infer from the coordination of the complaints. The allegation that Interscope had "incurred irreparable harm" and had been "deprived of its property rights" was unsupported and inferably known by the Interscope attorneys to be untrue.

Conclusion. The evidence in this record, interpreted as

it must be, in favor of the nonmoving party is sufficient to require the reversal of summary judgment for Kenner, Death Row, Interscope, Ortner, and Paul, Hastings. As a matter of law, their cases against her ended with prejudice. The law of this case is that there are triable issues as to probable cause. Tucker's evidence affords multiple instances where a jury could infer, from what Death Row, Kenner, Interscope, and Ortner said and did, that the suits brought and maintained against Tucker were knowingly and therefore maliciously filed without probable cause and were prosecuted with malice for three years in an oppressive way, long after a scintilla of cause had been extinguished.

Two issues appear to divide the court. The first is whether malicious prosecution can be shown by malicious acts by a defendant performed after the defendant has brought the lawsuit that the plaintiff complains of. Judge Paez's opinion seems to suggest that malice in the mind of the defendant can only be shown by what is alleged in his complaint. That view of the law is mistaken. Malice may be shown by malicious acts subsequent to the complaint in the continuation of the lawsuit. *See Zamos*, 32 Cal. 4th 958, 12 Cal. Rptr. 3d 54, 87 P.3d 802; *Del Rio v. Jetton*, 55 Cal. App. 4th 30, 36, 63 Cal. Rptr. 2d 712 (1997).

In *Zamos*, the court listed the elements of a suit for malicious prosecution, including the requirement that the suit was "*initiated* with malice." *Zamos*, 87 P.3d at 807 (citations omitted) (italics in original). The court noted that the defendants in the case before it argued that *continuing* to prosecute a lawsuit discovered to lack probable cause did not constitute the tort of

malicious prosecution. *Id.* The court rejected the defendants' argument. Its holding stated: "We conclude an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause." *Id.* at 803. As in *Swat-Fame*, knowledge of the lack of probable cause (in the court's phrase "discovery" of this lack) supplies the malice that supports the tort.

The second division is on whether knowing lack of probable cause may constitute proof of malice. Stressing the objective character of probable cause, Judge Paez's opinion suggests that absence of probable cause is not relevant to malice. But when a suit is brought without probable cause and the allegator knows that he has no probable cause, a window is opened to the mind of the allegator. California law clearly states that although lack of probable cause alone does not support an inference of malice, "malice may still be inferred when a party *knowingly* brings an action without probable cause." *Swat-Fame*, 101 Cal. App. 4th at 634 (citation omitted) (italics in original). Knowing that he has no basis for what he alleges, the allegator manifests malice in the hateful acts he imagines and attributes to the enemy he is pursuing.

In discussing Kenner's malice in charging Tucker with abuse of process, Judge Paez observes: a "fact-finder could reasonably infer from Kenner's drafting of the complaint [charging Tucker with abuse of process] that he did not believe the claim was valid when filed, or that the claim was instituted for an improper purpose." I agree with this reasoning, concur in Judge Paez's conclusion as to the vitality of Tucker's claim for malicious prosecution in Kenner's charge of abuse of process and wonder why the same rule does not apply

to the other claims advanced by the defendants where inferably they know they had no probable cause. I do not understand how this court, years after the original litigation, is capable of determining the state of mind of the defendants here. That is a question of fact. As a question of fact it is for a jury to decide.

In both our cases, an experienced fighter for civil rights, acting to defend her community, was charged with extortion, with seeking to enrich herself, and exploiting her own organization for her profit. Further, in the case brought by Kenner she was accused of committing major federal crimes nonexistent in fact and so vaguely alleged as to show on the face of the complaint that the lawyer had conjured them up or simply filled in a blank form. The court is in no position to conclude that the lawyers and their clients believed that these charges were true, rather than unscrupulous inventions. Indeed almost anyone would doubt that sophisticated lawyers could have known anything except that the charges were false. In any event, it is not for us now to decide this question, but to allow a jury to determine whether the lawsuits against Tucker were brought without probable cause and with knowledge of the absence of probable cause and therefore with malice. A court of the United States presented with a record as the one before us should not walk on by.

Footnotes

[1]After oral argument, we *sua sponte* consolidated the two cases on appeal.

[2]Mrs. Tucker is now deceased. In an order dated January 27, 2006, the district court granted Mr.

Tucker's motion to substitute himself, as Personal Representative of the Estate of plaintiff Cynthia Delores Tucker, as party plaintiff. On January 6, 2006, this court also substituted Mr. Tucker, in his capacity as Personal Representative of the estate, as an appellant pursuant to Fed. R. App. P. 43(a).

[3]The *Oxford EnglishDictionary* (online ed. 2007) defines gangsta rap as "a style of rap music, originating in south-central Los Angeles, featuring aggressive, often misogynistic lyrics, typically centering on the violence of gang culture."

[4]Atlantic was named as a nominal defendant and later dismissed on Interscope's motion.

[5]The district court and the parties relied on California law in both cases, as do we. Neither party has argued that Pennsylvania law should apply in the Interscope case. *See C.N.R. Atkin v. Smith*, 137 F.3d 1169, 1170-71 (9th Cir. 1998) ("The district court applied California law to this dispute and neither party objected. Therefore, we consider the parties to have waived any objection to the application of California law.").

[6]We consolidated *Tucker v. Kenner* with *Tucker v. Interscope* for purposes of the appeal from the initial summary judgments.

[7]After the Tuckers timely appealed the district court's judgment, Case No. 05-56045, Death Row filed for bankruptcy. We granted a stay as to Death Row but allowed the Tuckers to proceed after the bankruptcy court granted their motion for relief from the automatic stay provided in 11 U.S.C. § 362(a). Although Death Row has been represented by counsel throughout the duration of this appeal, it has never filed a brief and did not make an appearance at oral argument.

[8]Judge Noonan's partial concurrence and partial dissent states that "the district court has ruled as a matter of

law that Kenner lacked probable cause to bring the claim for abuse of process." Dissent at 1802. This statement is not entirely accurate. In the memorandum accompanying the district court's order the judge said two different things--stating in discussion that he "notes" that "Kenner lacked probable cause" to bring the abuse of process claim, but then on the following page concluding that "genuine issues of fact exist[ ] as to [probable cause], which preclude[ ] finding as a matter of law in his favor." *Tucker v. Kenner*, No. CV99-06129 (C.D. Cal. filed Feb. 24, 2006). This ambiguity is of no consequence to our ultimate disposition of the Tuckers' claim against Kenner. *See* discussion *infra* Part IV(C)(1).

[9]Nor need we revisit whether Mrs. Tucker suffered damages as a result of the underlying litigation because we determined that there were such damages in *Tucker v. Kenner*, 85 F. App'x 610 (9th Cir. Jan. 14, 2004) (unpublished).

[10]The California Supreme Court explained in *Sheldon Appel Co.* that "when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew" before the court can determine the existence of probable cause as a matter of law. *Id.* at 508.

[11]*See also id.* at 506 ("the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted.") (rejecting *Tool Research & Eng'g Corp. v. Henigson*, 46 Cal. App. 3d

675, 120 Cal.Rptr. 291 (Ct. App. 1975)).

[12]To the contrary, the dissent's use of *Swat-Fame* to insist that a *knowing* lack of probable cause can be inferred from a mere lack of probable cause is unfounded. Such an argument--as where the dissent argues that the absence of an actual breach of contract (objective evidence of probable cause) "could allow a jury to infer that Kenner *knowingly* brought [the claim] without probable cause"--both contradicts the plain facts of that case and effectuates an end-run around the very distinction central to *Swat-Fame*'s analysis. *See* Dissent at 1834, 1839; *see also* Dissent at 1835 (lack of probable cause for racketeering claim evinces "hate-filled malignancy"); Dissent at 1833 (Kenner lacking probable cause for abuse of process claim would allow the jury to infer not only that Death Row lacked probable cause but also that such a circumstance could lead a jury to infer that both Kenner and Death Row held "*knowing* assertion[s]" of malice (emphasis added)). We respectfully disagree with the dissent's characterization of *Swat-Fame*.

[13]The dissent overlooks this crucial distinction and therefore misreads *Zamos v. Stroud*. The dissent offers *Zamos* for the proposition that "malice in continuing a lawsuit is as actionable as malice in originating it." Dissent at 1837. But the dissent overlooks that the holding in *Zamos* did not concern the post-filing conduct of the parties. Rather, *Zamos* held that an attorney who continues to prosecute a suit that he knows is without basis is liable for malicious prosecution where "any reasonable attorney would agree [that the case is] totally and completely without merit" as a matter of law. *Zamos*, 87 P.3d at 810. This holding is narrow. Weighing the effect of newly acquired evidence on the continued prosecution of a

lawsuit is a matter peculiarly within the knowledge and competence of an attorney. It is difficult, therefore, to see how *Zamos* says anything about how the court should view Death Row's role with respect to the ad in *The Source* or Tupac's lyrics, or how *Zamos* stands for the general proposition that "malice in continuing a lawsuit is as actionable as malice in originating it."

[14]The Tuckers mistakenly rely on *Axline v. Saint John's Hospital and Health Center*, 63 Cal. App. 4th 907, 74 Cal.Rptr.2d 385 (Ct. App. 1998), *disapproved on other grounds by Hassan v. Mercy Am. River Hosp.*, 31 Cal. 4th 709, 3 Cal. Rptr. 3d 623, 74 P.3d 726 (Cal. 2003), for the proposition that a malicious-prosecution plaintiff can defeat a motion for summary judgment by *alleging* that the defendant knew that the information upon which he or she based the underlying claim was false. *Axline*, however, dealt with a dismissal following the trial court's sustaining of a demurrer, the California equivalent of a motion to dismiss on the pleadings under Federal Rule of Civil Procedure 12(b)(6). *See Axline*, 74 Cal.Rptr.2d at 387 ("When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action."). For purposes of a demurrer, California courts treat all allegations in the complaint as true. *C & H Foods Co. v. Hartford Ins. Co.*, 163 Cal. App. 3d 1055, 211 Cal.Rptr. 765, 768 (Ct. App. 1984). To defeat a summary judgment motion, by contrast, the non-moving party "may not rest upon the mere allegations or denials" in the pleadings. Fed. R. Civ. P. 56(e). The non-moving party must establish the existence of a genuine factual dispute on the basis of admissible evidence; bare allegations without evidentiary support are insufficient to survive summary judgment.

[15]In *Padres* the defendant moved to strike the plaintiff's malicious prosecution claim under California Code of Civil Procedure section 425.16, commonly known as the Strategic Lawsuit Against Public Participation ("SLAPP") statute. Defeating an anti-SLAPP motion requires the plaintiff to "make a prima facie showing of facts that would be sufficient to sustain a favorable judgment under the applicable evidentiary standard." *Padres*, 8 Cal.Rptr. 3d at 594.

[16]One page of the advertisement features in large type the words "DEATH ROW RECORDS" and promotes Snoop Dogg's latest album "Dogg Food from Tha Dogg Pound." The artists featured on the release are listed, and include Dr. Dre, Daz, and Kurupt. The facing page, in the same large type, features the words "FREEDOM FIGHTERS" and lists, in a similar fashion, the names of twelve legendary civil rights advocates, including Martin Luther King, Jr., Nelson Mandela, and Sojourner Truth. Mrs. Tucker's name appears at the bottom of the list slashed through with a red line. The page also includes a quotation from King's "I Have a Dream Speech" and a quotation by Knight, dated August 28, 1995: " 'Whether it's freedom for our people or freedom for our people to say what's on their minds the fight lives on . . .' " (ellipsis in original). Knight is identified as "CEO Death Row Records."

[17]"How Do U Want It" addresses Mrs. Tucker as a "muthafucka" and berates her because "instead of trying to help a nigga you destroy a brotha, worst than the others." In "U Wonda Why They Call U Bitch," Tupac raps, "Dear Ms. Delores [sic] Tucker, you keep stressin' me, fuckin with a motherfuckin' mind. I figured you wanted to know, you know, why we call them ho's bitches. Maybe this might help you understand. It ain't personal. It's strictly business, baby, strictly business."

These lyrics were the subject of separate litigation. *See Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001); *Tucker v. MTS, Inc.*, 229 F.3d 1139 (3d Cir. 2000) (Table) (unpublished).

[18]The Tuckers have failed to show a factual link between the ad in *The Source* and Interscope. The ad itself is silent as to Interscope and, presumably, for Interscope to be liable the Tuckers would have to show that Interscope was directly involved in the ad, or that Interscope, as the exclusive distributor of Death Row's music, managed and controlled Death Row to the extent that Death Row was a mere agent or instrumentality of Interscope, *see Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 105 P.2d 649, 654-55 (Cal. 1940) (establishing factors by which a parent corporation may be liable for the torts of a subsidiary). The Tuckers have failed to do either.

As to the derogatory references to Mrs. Tucker in *All Eyez On Me*, the fact that Death Row produced the album and that Interscope distributed it do not tie either defendant to the derogatory lyrics. No reasonable finder of fact could infer from the lyrics that Death Row or Interscope harbored malice towards Mrs. Tucker and filed the prior, underlying lawsuits for that reason.

[19]*Zamos* is the only California authority cited by the dissent for the proposition that "malice [by parties] in continuing a lawsuit is [ ] actionable." Dissent at 1837. But, the post-filing behavior at issue in *Zamos* involved an attorney who continued to prosecute a case after discovering facts demonstrating that the lawsuit had no merit. That case does not contemplate whether post-filing conduct *by the parties* evinces malice in *initiating* the suit.

[20]The fact that Kenner included multiple causes of action in the complaint, some of which were pled properly on the known facts at the time of filing, does not affect our determination that Kenner's abuse of process claim raises a triable issue of fact regarding malice. Under California law, "it is not necessary that the whole proceeding be utterly groundless, for, if groundless charges are maliciously and without probable cause, coupled with others which are well founded, they are not on that account less injurious, and, therefore, [even one charge can] constitute a valid cause of action." *Crowley v. Katleman*, 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083, 1088 (Cal. 1994) (internal quotation marks omitted); *see also Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608 (Cal. 1974) (approving a jury instruction allowing the jury to find for the plaintiff in a malicious prosecution action even if only one of the three theories of liability pleaded in the underlying action lacked probable cause).

[21]For this reason, although Kenner invites us to affirm the district court's grant of summary judgment on the basis that he had probable cause to include the abuse of process claim in *Death Row v. Tucker*, he has utterly failed, on this record, to demonstrate that he is entitled to judgment as a matter of law. We therefore have no basis on which to affirm on this alternative ground.

[22]We also note that the only additional evidence that Kenner obtained after he filed the complaint, according to his own deposition, was that, "[Tucker] apparently did call the Justice Department, I think Janet Reno directly, and I think she called Alcohol, Tobacco and Firearms, and I think she called the FBI . . . there [may have been] an investigation that followed." Even assuming *arguendo* that such complaints or

investigations occurred, the tort of abuse of process lies in the misuse of the power of the *court*. *Meadows*, 59 Cal.Rptr. at 37. Under these circumstances, a reasonable fact-finder could infer, as recognized in *Zamos*, that Kenner's continued prosecution of the abuse of process claim, after learning that it had no merit, was evidence of a malicious intent. *See also Sycamore Ridge Apt's v. Naumann*, 157 Cal. App. 4th 1385, 69 Cal.Rptr. 3d 561, 579-81 (Ct. App. 2007) (applying *Zamos*).

[23]The dissent provides no legal authority from a California court for its assertion that a decision to file numerous claims is probative of malice. Dissent at 1835-36. Nor does the "two against one" posture of the underlying litigation, *see id.* at 1838, establish any triable issue regarding malice.

Filed 2/24/2006
No. CV-99-06129-RMT.
United States District Court
for the Central District of California.

C. DELORES TUCKER, and William Tucker
her husband,
Plaintiffs,

v.

DAVID KENNER, GLENN SHUBB, GEOFFREY THOMAS, JUDITH KLINE, BELINDA OREM, JACK PALADINO and PAUL PALADINO,

MEMORANDUM

This matter is before the court on the motion by Defendant David Kenner for summary judgment based on lack of malice and for clarification of summary judgment order regarding favorable termination and probable cause. The court, having considered the pleadings end other matters set forth herein, finds that Defendant is entitled to summary judgment on the issue of malice.

Procedural Posture

On June 9, 2005, this court, on remand from the Ninth Circuit Court of Appeals, granted co-defendant Geoffrey Thomas' motion for summary judgment on Plaintiffs' malicious prosecution claim.'The court found that Plaintiffs failed to produce any evidence to show that Thomas acted with malice. To the extent Defendant Kenner sought summary judgment, the

court ruled that genuine issues of fact existed regarding the issues of favorable termination and probable cause for Defendant Kenner's abuse of process claim in the underlying litigation. Plaintiffs' malicious prosecution claim survived only to the extent it was based on Defendant Kenner's abuse of process claim. Defendant Kenner now seeks summary judgment on the issue of malice and asks the court to clarify its ruling on the issues of favorable termination and probable cause.

Factual Findings

The court found the following facts to be uncontroverted and established as a matter of law in its June 9, 2005 order: Between 1992 and 1998 Interscope Records, Inc. and Death Row Records, Inc. had a contractual relationship whereby Interscope was the exclusive distributor of Death Row's music.[2] Plaintiff Delores Tucker was an outspoken critic of Death Row's music[3] and pursued a campaign against Interscope and Death Row.[4]

In 1995, Mrs. Tucker met with Suge Knight, the head of Death Row[5] and attempted to convince Death Row (through Knight) to breach its contract with Interscope.[6] Mrs. Tucker went so far as to present a letter agreement for Knight's signature whereby Knight would authorize Mrs. Tucker's non-profit organization to negotiate (on Death Row's behalf) a production and distribution contract with Time Warner.[7] Knight never signed the letter agreement. Mrs. Tucker did not dispute that she knew of the Death Row-Interscope contract. Death Row and Interscope, through their attorneys, Kenner and Thomas, initiated

two separate lawsuits against Mrs. Tucker ("Underlying Litigation") seeking to enjoin her from interfering with the distribution agreement between Interscope and Death Row as well as damages.[8] Death Row's lawsuit (CV 95-5503- RMT) asserted claims for: RICO violations; intentional interference with contract; intentional interference with prospective business advantage; extortion; unfair business practices; and abuse of process.[9]

In March 1998, Interscope and Death Row terminated their contractual relationship.[10] On June 1, 1998, both Interscope and Death Row moved to voluntarily dismiss the Underlying Litigation.[11] The court thereafter dismissed the Underlying Litigation without prejudice.[12]

Legal standard

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[13] Where, as here, Defendant is moving for summary judgment, Defendant has the initial burden of establishing the absence of a genuine issue of material fact. Defendant has no burden to negate or disprove matters on which Plaintiffs bear the burden of proof at trial,[14] Instead, Defendant's burden may be discharged by showing that there is an absence of evidence to support the Plaintiffs' case.[15] When Defendant carries this burden, summary judgment is proper where Plaintiffs, the non-moving party, fail to make a showing sufficient to establish the existence of

an element essential to their case.[16] Plaintiffs must do more than simply show that there is some doubt as to the material facts.[17] Rather, Plaintiffs must provide concrete evidence from which a reasonable juror could return a verdict in their favor.[18] "[w]here the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found" the court is not required to "examine the entire file for evidence establishing a genuine issue of fact."[19]

Analysis

Malicious Prosecution of Abuse of Process Claim

For a malicious prosecution claim to succeed, a plaintiff must "prove that the prior action, commenced by or at the defendant's direction, 1) terminated favorably as to the plaintiff, 2) was brought without probable cause, and 3) was initiated with malice."[20] Moreover, an attorney "who continues to prosecute [a lawsuit] after learning it is not supported by probable cause" may be liable for malicious prosecution even if his initiation of the lawsuit was proper.[21] A plaintiff must also prove that she was damaged by the prior action.[22]

Malice

In order to satisfy the malice element in a malicious prosecution action, a plaintiff must demonstrate "either actual hostility or ill will on the part of the [plaintiffs in the underlying litigation] or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant."[23] Malice cannot be imputed to attorneys.[24] Instead, a plaintiff must show that the attorney in the

underlying action "maliciously purse[ed] an objectively untenable claim."[25] While an attorney's lack of probable cause to pursue a claim is relevant in assessing whether he acted with malice, a lack of probable cause alone is insufficient to support a finding of malice absent other, additional evidence.[26] Accordingly, summary judgment is appropriate where a plaintiff fails to produce sufficient evidence to show malice.[27]

Here Plaintiffs' allegation of malice rests primarily on Plaintiffs' belief that Kenner knew the underlying litigation was untenable and that his conduct throughout the course of that litigation evidences his ill intent. Specifically, Plaintiffs assert that Kenner knew Mrs. Tucker did not threaten his client, but that he filed the underlying litigation to harass Mrs. Tucker. Likewise, Plaintiffs assert that Kenner's failure to seek a hearing far a TRO, his decision to target Mrs. Tucker rather than other defendants with deeper pockets, and his voluntary dismissal of litigation on the eve of trial all suggest malice.

While the court notes that Kenner lacked probable cause to pursue a claim of abuse of process in the underlying litigation, the evidence Plaintiffs offer in addition to this finding is insufficient to show that Kenner acted with malice. Plaintiffs' have offered no evidence to support their allegation that Kenner knew no threats were levied against his client. Moreover, Plaintiffs' assertion is inconsistent with Kenner's deposition testimony as well as Mrs. Tucker's admission that she did contact the Justice Department and the FBI regarding Death Row Records.[28] Lastly, Plaintiffs' allegations about Kenner's conduct during the course of litigation amount to nothing more than mere

speculation and fail to demonstrate actual hostility or ill will. A reasonable jury could not return a verdict in Plaintiffs' favor on this evidence. As such, summary judgment is warranted as to this issue.

Request for Clarification

Defendant Kenner also seeks clarification as to the court's ruling regarding probable cause and favorable termination. The court advises Defendant that genuine issues of fact existed as to both issues which precluded a finding as a matter of law in his favor.

Footnotes

[1]On January 26, 2006, the court granted the motion for substitution of William Tucker as Personal Representative of the Estate of Plaintiff Cynthia Delores Tucker, a/k/a Delores Tucker in place of Plaintiff C. Delores Tucker. Mrs. Tucker's remaining claim survives her death. California Code of Civil Procedure § 337.20(a).

[2] See Ted Field Decl. at Par.2.

[3] See Plaintiffs' Complaint at Par.7.

[4] See Def. Ex. H at 19:19-21; Def. Ex. I at 54:19-21.

[5]See Def. Ex. A at Par.12; Def. Ex. DD at 170:20-171:14.

[6]See Def. Ex. P at 87:22- 70:8; Def. Ex. H at 290:22-291:16.

[7]See Ex. B to Plaintiffs' Opposition to Motion for Summary Judgment.

[8] See Plaintiffs' Complaint at Par. 16.

[9] Complaint, CV 99-5503-RMT

[10] See Def. Ex. AA; Def. Ex. V.

[11]Id.

[12] See Def. Ex. Y & Z.

[13]F.R.C.P. Rule 56(c).

[14]Celotex v. Catrett, 477 U.S. 317, 325 (1986).

[15] 1d.

[16] Id. at 322.

[17]Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

[18] Anderson v. Liberty. Lobby, Inc., 477 U.S. 242, 252 (1986) ("[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient").

[19] Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir., 2001).

[20] Sierra Club Foundation v. Graham, 72 Cal. App. 4th 1135, 1147 (1999).

[21] Zamos v. Stroud, 32 Cal. 4th 958, 950 (2004).

[22] See vvillams v. Coombs,179 Cal. App. 3d 626, 631 (1986). On appeal, the Ninth Circuit ruled that Plaintiffs presented sufficient evidence to show that Mrs. Tucker suffered damages as a result of the underlying litigation.

[23] Downey Venture v. LMI Ins. Co., fib Cal. App. 4th 478, 498-9 (1998).

[24]Rogers v. Peinado, 85 Cal. App. 4th 1, 7 (overruled on other grounds).

[25] Id.

[26] Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 748 (Cal. 2003); HMS Capital, Inc. v. Lawyers Title Co.,118 Cal. App. 4th 204, 218 (Cal. Ct. App. 2004)(citing Downey Venture, 58 Cal. App. 4th at 498-499).

[27] Gomez v. Garcia.112 Cal. App. 3d 392 (1980).

[28] See Def. Ex. P at 48:2-15; 66:3-67:3;103:14-101:12; Def. Ex. HH at 453:10-456:4.

Filed 6/27/2005
No. 99-03679
United States District Court
for the Central District of California.

D. DELORES TUCKER, and William E. Tucker her husband,
Plaintiffs,

v.

INTERSCOPE RECORDS, INC.; et al.
Defendants .

MEMORANDUM

This matter has come before the court on remand from the Ninth Circuit Court of Appeals on the motions by Defendants Interscope Records, Inc., Interscope Records, Paul, Hastings, Janofsky & Walker, LLP, and Charles Ortner for summary judgment used on: (1) lack of favorable termination; (2) existence of probable cause and lack of malice; (3) no loss of consortium; and (4) unclean hands. Defendants' motions are joined by Defendant Death Row Records. The court, having considered the Ninth Circuit order as well a the pleadings and other papers filed in this matter, finds that:

Background

On October 28, 2002, the court granted the motion by Defendants Interscope Records, Inc., Interscope Records, Death Row Records, Inc., Charles Ortner, and Paul, Hastings, Janofsky, & Walker, LLP for summary

judgment on the basis of lack of damages and no loss of consortium and denied as moot Defendants' motions based on (1) lack of favorable termination; (2) existence of probable cause and lack of malice and (3) unclean hands. Plaintiffs appealed and on January 14, 2004, the Ninth Circuit Court of Appeals reversed and remanded. Specifically, the Ninth Circuit found that Plaintiffs had provided sufficient evidence of damages for mental distress which "caused or exacerbated medical problems" and debts owed to their attorneys far "non-fee expenses" warranting denial of summary judgment on the issue of damages, and remanded for reconsideration of Defendants' other motions.[1]

Factual Findings[2]

Between 1992 and 1998 Interscope Records, Inc. and Death Row Records, Inc. had a contractual relationship whereby Interscope was the exclusive distributor of Death Row's music.[3] Plaintiff Delores Tucker ("Mrs. Tucker") has been an outspoken critic of Death Row's music[4] and pursued a campaign against Interscope and Death Row.[5]

In 1995, Mrs, Tucker met with Suge Knight, the head of Death Row[6] and attempted to convince Death Row (through Knight) to breach its contract with Interscope.[7] Mrs. Tucker went so far as to present a letter agreement for Knight's signature whereby Knight would authorize Mrs. Tucker's non-profit organization to negotiate (on Death Row's behalf) a production and distribution contract with Time Warner.[8] Knight never signed the letter agreement. Mrs. Tucker does not dispute that she knew of the Death Row-Interscope contract. Interscope and Death

Row initiated two separate lawsuits against Mrs. Tucker ("Underlying Litigation") seeking to enjoin her from interfering with the distribution agreement between Interscope and Death Row a well as damages.[9] Defendants Paul, Hastings, Janofsky & Walker, LLP and Charles Ortner represented Interscope in its lawsuit (CV 95-5444- RMT) which asserted claims for: inducement to breach contract, intentional interference with contract; intentional interference with prospective business advantage; unfair business practices; and unfair competition.[10] Death Row's lawsuit (CV 95-5503) asserted claims for: RICO violations; intentional interference with contract; intentional interference with prospective business advantage; extortion; unfair business practices; abuse of process.[11]

In March, 1998, Interscope and Death Row terminated their contractual relationship.[12] On June 1, 1998, both Interscope end Death Row moved to voluntarily dismiss their respective lawsuits in the Underlying Litigation.[13] The court thereafter dismissed the Underlying Litigation without prejudice.[14]

In August 1998, Plaintiffs Dolores and William Tucker initiated this lawsuit asserting claims for malicious prosecution, abuse of process, intentional infliction of emotional harm, and negligent infliction of emotional distress in the Eastern District of Pennsylvania.[15] In April 1999, Plaintiffs' lawsuit was transferred to this court. In July 2002, this court dismissed all of Plaintiffs' claims except their claim far malicious prosecution on the basis of res judicata. Defendants now challenge this claim.

Legal standard

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[16] Where, as here, Defendants are moving for summary judgment, they have the initial burden of establishing the absence of a genuine issue of material fact, but have no burden to negate or disprove matters on which the Plaintiffs bear the burden of proof at trial.[17] Instead, Defendants" burden may be discharged by showing that there is an absence of evidence to support the nonmoving party's case.[18] When Defendants carry their burden, summary judgment is proper if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case.[19] The non-moving party must do more than simply show that there is some doubt as to the material facts.[20] Rather, the non-moving party must provide concrete evidence from which a reasonable juror could return a verdict in its favor.[21] "[W]here the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found" the court is not required to "examine the entire file for evidence establishing a genuine issue of fact."[22]

Analysis

Malicious Prosecution

For a malicious prosecution claim to succeed, a plaintiff must "prove that the prior action, commenced by or at the defendant's direction, 1) terminated favorably as to the plaintiff, 2) was brought without probable cause,

and) was initiated with malice.[23]Moreover, an attorney "who continues to prosecute [a lawsuit] after learning it is not supported by probable cause" may be liable for malicious prosecution even if his initiation of the lawsuit was proper.[24] A plaintiff must also prove that she was damaged by the prior action.[25] Defendants' motion summary judgment challenges the foregoing elements for the malicious prosecution claim.

1. Favorable Termination in Plaintiff's Favor.

Defendants contend summary judgment is warranted on the issue of favorable termination because their voluntary dismissal of the Underlying Litigation "leaves a residue of doubt about the plaintiffs innocence or liability."[26] The court finds that Defendants' reasons for dismissing the underlying litigation is a question of fact for which genuine issues remain. Accordingly, summary judgment is not warranted on this issue.

2. Lack of Probable Cause

To maintain the instant malicious prosecution claim, Plaintiffs must show that the Defendants did not have probable cause to bring each of the causes of action alleged in the Underlying Litigation.[27] Probable cause is a mixed question of fact and law. If there is any conflict in the evidence, the jury may determine whether the circumstances exist to establish probable cause, otherwise the question of whether probable cause exists is one for the court.[28] Probable cause is present "unless any reasonable attorney would agree that the action is totally and completely without merit.[29] To prevail on her claim, Plaintiff Mrs. Tucker must show that none of the Defendants had probable cause to

prosecute a lawsuit against her for: 1) Intentional Interference with Contractual Relationship; 2) Intentional Interference with Economic Advantage; and) Unfair Business Practices and Competition. As to Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP, Plaintiff Mrs. Tucker must also show that there was no probable cause to pursue claims for: 1) Inducement to Breach Contract and 2) Inducement to Breach Fiduciary Duty. As to Defendant Death Row Records, Plaintiff Mrs. Tucker must also show that there was no probable cause to prosecute a lawsuit against her for: 1) RICO violations; 2) Extortion; and 3) Abuse of Process.

Claims Prosecuted by All Defendants

A. Probable cause for intentional interference with contractual relationship

The tort of intentional interference with contractual relationship requires: "1) a valid and existing contract with a third party; 2) Defendant had knowledge of this contract; 3)
Defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; 4) actual interference with or disruption of the relationship; and 5) resulting damages."[30]

This tort differs from the tort of inducement to breach a contract in that it does not require an actual breach of the contract, merely an actual disruption. Because of this difference, it is reasonable for Defendants and their attorneys to find probable cause that Mrs. Tucker's attempts to woo Death Row from Interscope did in fact

cause an actual disruption of the contractual relationship between Inter cope Records and Death Row Records.

For instance Mr. Field, one of the founders of Interscope Records, declared that "important records were delayed and executive time was devoted to dealing with the crisis."[31] This undisputed statement supports an actual disruption of the relationship between his client and the other contracting party, Death Row Records, as well as claim for damages. Therefore, Defendants had probable cause to file a claim against Mrs. Tucker for intentional interference with a contractual relationship.

B. Probable cause for intentional interference with prospective business advantage

Intentional interference with prospective business advantage differs from intentional interference with contractual relationship in that it does not require an actual and existing contract.[32] Rather, this tort protects "against intentional acts designed to harm an economic relationship which is likely to produce economic benefit.[33] The elements for this tort are: 1) Plaintiffs "had an economic relationship with a third party containing the probability of a future economic benefit; 2) defendant had knowledge of this relationship; 3) defendant committed intentional and unjustified acts designed to disrupt the relationship; 4) actual disruption of the relationship; and 5) resulting damages."[34]

The first three elements of this tort are supported by probable cause for the reasons stated above.

Additionally, because this tort does not require an actual breach of the contract but just an "actual disruption," the fourth and fifth elements are also supported by probable cause, as indicated in the Field declaration.[35] Thus, Defendants had probable cause to file a claim for intentional interference with prospective economic advantage against Mrs. Tucker.

C. Probable cause for unfair business practices and unfair competition

California Business & Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." The California Supreme Court in Farmers Ins. Exchange v. Superior Court stated that "in essence, an action based on... section 17200 to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [this] section.[36]

The business activity at issue here is the record distribution deal that Plaintiff was trying to co-opt from Interscope to Time Warner as evidenced by the letter agreement presented by Plaintiff to Suge Knight. The violations of other laws described above provides the probable cause far both intentional interference with contractual relationship and with prospective business advantage.

Claims Prosecuted by Defendants Interscope Records Inc. Interscope Records Ortner, and Paul, Hastings, Janofsky & Walker, LLP

D. Probable cause for inducement to breach contract

A claim for inducement to breach a contract requires: 1) a valid contract; 2) Defendant knew of this contract and intended to induce its breach; 3) that the contract was inn fact
breached resulting in injury to plaintiff;" and 4) the resulting injury were "proximately caused by Defendant's unjustified or wrongful conduct."[37] The court finds that genuine issues of fact exist regarding the existence of probable cause for the prosecution of the claim against Mrs. Tucker for inducement to breach contract by Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP. Accordingly, summary judgment is not warranted on this issue.

E. Probable cause for inducement to breach fiduciary duty

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach,"[38] The court finds that genuine issues of fact exist regarding the existence of probable cause on Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP's claim against Mrs. Tucker for inducement to breach fiduciary duty. Accordingly, summary judgment is net warranted on this issue.

Claims Prosecuted by Death Row Records

F. Probable cause for RICO violations and

Extortion

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), it is unlawful for any person associated with any enterprise, the activities of which affect interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.[39] The types of racketeering activity that will support a RICO claim are listed in 18 U.S.C. §1962 and extortion is listed as such an activity.[40] Extortion is defined as "the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right."[41] Furthermore, threatening to accuse an individual of a crime can create a fear that underlies extortion.[42] California Penal Code § 523 states that:

> Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in [§519] is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Although the court has found in the related case that Death Row Records' attorney, David Kenner, had probable cause to litigate a claim on behalf of Death Row Records against Mrs. Tucker for RICO violations and extortion, the court finds that genuine issues of fact exist as to whether Defendant Death Row Records had probable cause to assert such claims against Mrs.

Tucker.[43] This is explained by the fact that Defendants' motion, which is identical in both actions, affirmatively demonstrates that Death Row Records' attorney believed that Mrs. Tucker had threatened Suge Knight with criminal prosecution if he did not leave Inter cope and contract with Time Warner.[44] Such a showing is sufficient to show that Plaintiffs could not prove that "any reasonable attorney would agree that [the RICO and extortion claims pursued by Defendant Kenner were] totally and completely without merit.[45] Defendants motion, however, is silent a to the basis on which Death Row Records pursued the RICO and extortion claims. Additionally, Plaintiff Mrs. Tucker denies threatening Suge Knight with criminal prosecution if he failed to agree to her demands.[46] Accordingly, genuine issues of fact exist as to whether the facts on which Defendant Death Row Records pursued its RICO and extortion claims were sufficient to establish probable cause.

G. Probable cause for Abuse of Process

"The tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed."[47] "The essence of the tort is misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice."[48] The court finds that genuine issues of fact exist a to whether Defendant Death Row Records had probable cause to assert a claim against Mrs. Tucker for abuse of process.

3. Malice

In order to satisfy the malice element in the malicious

prosecution action, the plaintiff has to demonstrate "either actual hostility or ill will on the part of the [Plaintiffs in the underlying litigation] or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant."[49] Malice cannot be imputed to attorneys.[50] instead, a plaintiff must show that the attorney in the underlying action "maliciously pursu[ed] an objectively untenable claim."[51] At the outset, when the facts are in dispute, malice must be left to the jury to decide.[52] However, summary judgment is appropriate where a plaintiff fails to produce sufficient evidence to show malice.[53]

Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP, as joined by Death Row Records, assert that Plaintiffs have failed to produce any evidence demonstrating that they acted with malice in pursuing the underlying lawsuit.[54] Instead, Defendant Thomas notes that Mrs. Tucker stated in her deposition that she "believe[d] [Interscope and its attorneys] are honorable men," but that "they were pursuing [the litigation] like they really believed it."[55] Plaintiffs assert that Mrs. Tucker's personal opinion as to whether Defendants acted with malice is irrelevant.[56] Moreover, Plaintiffs contend that Interscope's attorneys cannot deny they acted with malice because they relied on the attorney client privilege as a basis for withholding discovery related to the filing of the underlying complaint which Plaintiffs believe would have shown malice had they been obtained.[57]

The court agrees with Plaintiffs that the personal beliefs of Mrs. Tucker have no bearing on whether

Defendants acted with malice. However, as noted by the Ninth Circuit, Plaintiffs cannot rely on new objections to prior discovery rulings as a basis for opposing Defendants' motion. Accordingly, summary judgment is warranted as to Plaintiffs' malicious prosecution claim against Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP, and Death Row Records because Plaintiffs have failed to produce any evidence to show that these Defendants acted with malice.

4. Loss of Consortium Damages

Plaintiffs also claimed that Mr. Tucker suffered loss of consortium from the tortious acts committed upon his spouse. Loss of consortium refers to "the right of one spouse to state a cause of action for loss of companionship, emotional support, love, felicity and sexual relations caused by a negligent or intentional injury to the other spouse by a third party."[58] Recovery for loss of consortium i possible for a spouse's psychological injuries where the injured "spouse suffers a traumatically induced neurosis, psychosis, chronic depression, or phobia" which "grievously injure[s]" the marriage for an extended period of time.[59] Recovery is not available, however, for a spouse who merely suffers "a loss of society, companionship and support" or where the relationship is only "superficially or temporarily unpaired" as a result of the spouse's injuries.[60]

Although the Ninth Circuit has found evidence that Mrs. Tucker suffered significant emotional distress, Mr. Tucker fails to carry his burden of production on his loss of consortium claim. While it is clear that the

underlying litigation took a toll on Plaintiffs' marriage, the injuries suffered by Ms. Tucker did not grievously injure their marriage to the extent that Mr. Tucker was denied companionship, emotional support, love, and felicity. Instead, Mr. Tucker's deposition states that his marriage suffered because the stress of the underlying litigation made it difficult to spend "leisurely time" with his wife.[61] Specifically when questioned about the effects Mrs. Tuckers injuries have had on their marriage, Mr. Tucker appeared most aggrieved by the fact that he is no longer able to enjoy a cup of Coffee in the morning with his wife and refuses to allow her to make him coffee in the morning (despite her offers to do so) because he believes she needs to rest as much as possible.[62] His claim finds even less support in Mrs. Tuckers deposition testimony that the underlying litigation did not cause problems in their relationship "except that it wears you out" and made it difficult to "just relax and have a normal life."[63]

Although it is unfortunate that Plaintiffs' marriage suffered from the stress of the underlying litigation, Plaintiffs' testimony demonstrates that the harm caused to their marriage by Mrs. Tucker's injuries is more akin to a loss of society and companionship than the type of longstanding and debilitating impairment to the relationship necessary to support a loss of consortium claim. Thus, Plaintiffs' averment that loss of consortium should be decided by the jury puts the cart before the horse where, as here, there is no triable issue of material fact for the jury to decide.[64] Accordingly, summary judgment is warranted on this issue.

Unclean Hands

Defendants also seek summary judgment on the grounds that Plaintiffs' claims are barred by the doctrine of unclean hands. The unclean hands defense applies in malicious prosecution actions and bars the plaintiff from relief if the plaintiff "has engaged in any unconcientious conduct directly related to the transaction or matter before the court."[65]

The court finds that genuine issues of fact exist on Defendants' unclean hands defense
which preclude summary judgment.[66]

Conclusion

For the above stated reasons, the court finds that genuine issues of material fact remain as to:
(1) the favorable termination element of Plaintiffs' malicious prosecution claim;
(2) the lack of probable cause element of Plaintiffs' malicious prosecution claim with respect to the claims asserted by Defendants Interscope Records, Inc., Interscope Records, Ortner, and Paul, Hastings, Janofsky & Walker, LLP for inducement to breach contract and inducement to breach fiduciary duty and by Defendant Death Row Records for RICO violations, extortion, and abuse of process;
(3) the defense of unclean hands.

The court further finds that Defendants have established as a matter of law that they had probable cause to negate Plaintiffs' claims far malicious prosecution with respect to:

(1) Defendants Interscope Records, Inc., Interscope Records, Death Row Records, Inc., Charles

Ortner, and Paul, Hastings, Janofsky, & Walker, LLP's claims for intentional interference with a contractual relationship; intentional interference with prospective business advantage; and unfair business practices and unfair competition.

The court also finds that Defendants Interscope Records, Inc., Interscope Records, Charles Ortner, and Paul, Hastings, Janofsky, & Walker, LLP, and Death Row Records have established as a matter of law that Plaintiffs cannot shove malice as to those Defendants.

Lastly, the court finds that Defendants Interscope Records, Inc., Interscope Records, Death Row Records, Inc., Charles Ortner, and Paul, Hastings, Janofsky, & Walker, LLP's have established as a matter of law that Mr. Tucker cannot prevail on his claim for damages for loss of consortium.

Footnotes

[1]85 Fed. Appx. 810, 512- 518 (2004). The Ninth Circuit's reversal of this court's finding that Plaintiffs failed to present evidence that Mrs. Tuckers was injured in the underlying litigation requires reconsideration of the order granting Defendants' summary judgment motion based on no loss of consortium as that ruling was expressly based on this court's finding that Mrs. Tucker incurred no damage.

[2] The following facts are uncontroverted and the court, therefore, finds such facts established as a matter of law.

[3] See Ted Field Decl. at Par. 2.

[4] See Plaintiffs' Complaint at Par. 7.

[5] See Def. Ex. H at 19:19-21; Def. Ex. I at 54:19-21.

[6]See Def. Ex. A at Par. 12; Def. Ex. DD at 179:20-171:14.

[7]See Def. Ex. P at 57:22- 70:3; Def. Ex. H at 290:22-291:1G.

[8] See Ex. B to Plaintiffs' Opposition to Motion for Summary Judgment.

[9] See Plaintiffs' Complaint at 716.

[10] Complaint, CV 95-5444-RMT,

[11]Complaint, CV 95-5503-RIVIT.

[12] See Def. Ex. AA; Def. Ex. V.

[13] Id.

[14] See Def. Ex. Y & Z.

[15]Plaintiffs' Complaint.

[16]F.R.C.P. Rule 55(c).

[17]Celotex v, Catrett, 477 U.S. 817, 325 (1986).

[18] Id.

[19] Id. at 322.

[20]Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986),

[21] Anderson v. Liberty_ Lobby, Inc., 477 U.S. 242, 252 (1985) ("[t]he mere existence of
a scintilla of evidence in support of the plaintiffs position will be insufficient").

[22] Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1020, 1031 (9th Cir. 2001).

[23]Sierra Club Foundation v. Graham, 72 Cal. App. 4th 1135, 1147 (1999).

[24] Zamos v. Stroud, 32 Cal. 4th 958, 960 (2005).

[25] See Willams v. Coombs,179 Cal. App. 3d 626, 631 (1986). As noted above, the Ninth Circuit ruled that Plaintiffs presented sufficient evidence to show that Mrs. Tucker suffered damages as a result of the underlying litigation. Accordingly, this order addresses the first three elements Plaintiffs must prove in order to succeed on their malicious prosecution claim as well

as Mr. Tucker's damages for loss of consortium.

[26]Sierra Club Foundation, 72 Cal. App. 4th at 1149.

[27] See Roberts v. Sentry, 78 Cal. App. 4th 375, 382 (1999).

[28] See Weber v. Leuschner, 240 Cal. App. 2d 829, 830 (1986).

[29] Roberts,70 Cal. App. 4th at 382.

[30]Shamblin v. Berge,16 Cal. App, 3rd 118,123 (1988).

[31] Field Decl., Par.5.

[32] Shamblin,18 Cal. App. 3d at 123.

[33]Id.

[34] Id.

[35] See Ted Fields Decl. Par. 5 ("important records were delayed and executive time was devoted to dealing with the crisis").

[36] 2 Cal. 4th 377, 383 (1992)(internal quotations omitted).

[37] See Freed v. Manchester Service, Inc., 165 Cal. App. 2d 186, 189(1958).

[38] City of Atascadero v. Merrill Lynch,Pierce, Fenner & Smith, 68 Cal. App. 4th 445, 483 (1998).

[39] See 18 U.S.C. § 1962(c).

[40] See 18 U.S.C. §1961.

[41]Cal. Penal Code §518.

[42] See Cal. Penal Code §519(2).

[43] See June 9, 2005 Order Granting in Part and Denying in Park Defendants' Motions for Summary Judgment at 9, Par. 5-21-10, T1-17. CV 99- 6129- RMT (CTx)

[44] Id.

[45] Roberts,76 Cal. App. 4th at 382.

[46] Plaintffs' Response to Defendants' Statement of Uncontroverted Facts and Conclusions of Law: Par.7.

[47] Drown v. Kennard, 94 Cal. App. 4th 40, 44 (Cal. Ct. App. 2002).

[48] Id. (Internal quotations omitted).

[49] Downey Venture v. LMI Ins. Co., 68 Cal. App. 4th

478, 498-9 (1998). 50Rogers v. Peinado, 85 Cal. App. 4th 1, 7 (overruled on other grounds).

[51] Id.

[52]See Weaver v. Superior Court, 95 Cal. App. 3d 166, 188 (1979).

[53]Gomez v. Garcia,112 Cal. App. 3d 392 (1980).

[54] Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment Based on Existence of Probable Cause and Lack of Malice at 21.

[55] Def. Ex. H at 97:14-18.

[56] Plaintiffs' Response to Def. Stmnt. of Uncontroverted Facts and Conclusions of Law at Par.38.

[57] Id.

[58] Anderson v. Northrop Corp., 203 Cal. App. 3d 772, 780 (1988)(internal quotations omitted).

[59] Molien v. Kaiser Found Hasps., 27 Cal. 3d 910, 933 (1980); Anderson, 203 Cal. App. 3d at 780.

[60] Anderson, 203 Cal. App. 3d at 780 (Affirming the dismissal of a plaintiffs claim for loss of consortium based on the "loss of society, companionship and support" of her husband after he was wrongfully discharged from his job and became "mentally upset, distressed and agaravated').

[61]Def. Ex. LL at 138:21.

[62] Def. Ex. LL at 136:7-143:14.

[63] See Def. Ex. H at 269:4-16.

[64] Anderson v. Liberty Lobby, Inc., 477 U.S. at 252 ("[t]he mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient" to survive a motion for summary judgment).

[65] De Rosa v. Transamerica Title Ins. Co., 213 Cal. App. 3d 1390, 1395 (1989).

Filed 6/10/2006
No. CV-99-06129-RMT.
United States District Court
for the Central District of California.

C. DELORES TUCKER, and William Tucker
her husband,
Plaintiffs,

v.

DAVID KENNER, GLENN SHUBB, GEOFFREY THOMAS, JUDITH KLINE, BELINDA OREM, JACK PALADINO and PAUL PALADINO,

MEMORANDUM

This matter has come before the' court on remand from the Ninth Circuit Court of Appeals on the motions by Defendants David Kenner and Geoffrey Thomas for summary judgment based on: (1) lack of favorable termination; (2) existence of probable cause and lack of malice; (3) no loss of consortium; and (4) unclean hands. The court having considered the Ninth Circuit order as well as the pleadings and other papers filed in this matter, finds that:

Background

On October 28, 2002, the court granted Defendants' motion for summary judgment the basis of lack of damages and no loss of consortium and denied as moot Defendants' motions based on (1) lack of favorable termination; (2) existence of probable cause and lack of malice and (3) unclean hands. Plaintiffs appealed and on

January 14, 2004, the Ninth Circuit Court of Appeals reversed and remanded. Specifically, the Ninth Circuit found that Plaintiffs had provided sufficient evidence to support a showing of damages for mental distress which "caused or exacerbated medical problems" and debts owed to their attorneys for "non-fee expenses" and remanded for reconsideration of Defendants' other motions.

Factual Findings[2]

Between 1992 and 1998 Interscope Records, Inc. end Death Row Records, Inc. had a contractual relationship whereby Interscope was the exclusive distributor of Death Row's music[3] Plaintiff Delores Tucker ("Mrs. Tucker") has been an outspoken critic of Death Row's music[4] and pursued a campaign against Interscope and Death Row.[5]

In 1995, Mrs. Tucker met with Suge Knight, the head of Death Row[6] and attempted to convince Death Row (through Knight) to breach its contract with Interscope.[7] Mrs. Tucker went so far as to present a letter agreement for Knight's signature whereby Knight would authorize Mrs. Tucker's non-profit organization to negotiate (on Death Row's behalf) a production and distribution contract with Time Warner.[8] Knight never signed the letter agreement. Mrs. Tucker does not dispute that she knew of the Death Row-Interscope contract. Interscope and Death Row, through their attorneys, Thomas and Kenner respectively, initiated two separate lawsuits against Mrs. Tucker ("Underlying Litigation") seeking to enjoin her from interfering with the distribution agreement between Interscope and Death Row as well as

damages.[9] Interscope's lawsuit (CV 95-5444- RMT) asserted claims for: inducement to breach contract, intentional interference with contract; intentional interference with prospective business advantage; unfair business practices; and unfair competition.[10] Death Row's lawsuit (CV 95-5503 RMT) asserted claims for: RICO violations; intentional interference with contract; intentional interference with prospective business advantage; extortion; unfair business practices; and abuse of process.[11]

In March, 1998, Interscope and Death Row terminated their contractual relationship.fn12 On June 1, 1998, both Interscope and Death Row moved to voluntarily dismiss their respective lawsuits in the Underlying Litigation.[13] The court thereafter dismissed the Underlying Litigation without prejudice.[14]

On June 15, 1999, Plaintiffs Dolores and William Tucker initiated this lawsuit asserting claims for malicious prosecution, abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress.[15] Plaintiffs subsequently withdrew all of their claims except their claim for malicious prosecution which Defendants now challenge.[16]

Legal standard

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[17] Where, as here, Defendants are moving for summary judgment, they have the initial

burden of establishing the absence of a genuine issue of material fact, they have no burden to negate or disprove matters on which the Plaintiffs bear the burden of proof at trial.[18] Instead, Defendants' burden may be discharged by showing that there is an absence of evidence to support the nonmoving party's case.[19] When Defendants carry their burden, summary judgment is proper if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case.[20] The non-moving party must do more than simply shove that there is some doubt as to the material facts.[21] Rather, the non-moving party must provide concrete evidence from which a reasonable juror could return a verdict in its favor.[22] "[W]here the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found" the court is not required to "examine the entire file for evidence establishing a genuine issue of fact."[23]

Analysis[24]

Malicious Prosecution

For a malicious prosecution claim to succeed, a plaintiff must "prove that the prior action, commenced by or at the defendant's direction, 1) terminated favorably as to the Plaintiff, 2) was brought without probable cause, and 3) was initiated with malice."[25]

Moreover, an attorney "who continues to prosecute [a lawsuit] after learning it is not supported by probable cause" may be liable for malicious prosecution even if his initiation of the lawsuit was proper.[26] A plaintiff must also prove that she was damaged by the prior

action.[27]Defendants now move for summary judgment on the absence of one or more of the foregoing elements for a malicious prosecution claim.

1. Favorable Termination in Plaintiff's Favor.

Defendants contend summary judgment is warranted on the issue of favorable termination because their voluntary dismissal of the Underlying Litigation "leaves a residue of doubt about the plaintiffs innocence or liability."[28] The court finds that Defendants' reasons

for dismissing the underlying litigation is a question of fact far which genuine issues remain. Accordingly, summary judgment is not warranted on this issue.

2. Lack of Probable Cause

To maintain the instant malicious prosecution claim, Plaintiffs must show that the Defendants did not have probable cause to bring each of the causes of action alleged in the Underlying Litigation.[29] Probable cause is a mixed question of fact and law. If there is any conflict in the evidence, the jury may determine whether the circumstances exist to establish probable cause, otherwise the question of whether probable cause exists is one for the court.[30] Probable cause is present "unless any reasonable attorney would agree that the action is totally and completely without merit."[31] Plaintiff needs to show that neither Kenner nor Thomas had probable cause to prosecute a lawsuit against her for: 1) Intentional Interference with Contractual Relationship; 2) Intentional Interference with Economic Advantage; and 3) Unfair Business Practices and Competition. For Defendant Thomas, Plaintiff

must also show that there was no probable cause to pursue claims fof:1) Inducement to Breach Contract and 2) Inducement to Breach Fiduciary Duty. For Defendant Kenner, Plaintiff must also show that he did not have probable cause to prosecute a lawsuit against her for: 1) RICO violations; 2) Extortion; and) Abuse of Process.

Claims Prosecuted by Both Thomas and Kenner

A. Probable cause for intentional interference with contractual relationship

The tort of intentional interference with contractual relationship requires: "1) a valid and existing contract with a third party; 2) Defendant had knowledge of this contract; 3) Defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; 4) actual interference with or disruption of the relationship; and 5) resulting damages."[32]

This tort differs from the tort of inducement to breach a contract in that it does not require an actual breach of the contract, merely an actual disruption. Because of this difference, it is reasonable for an attorney to find probable cause that Mrs. Tucker's attempts to woo Death Row from Interscope did in fact cause an actual disruption of the contractual relationship between Interscope Records and Death Row Records.

For instance Mr. Field, one of the founders of Interscope Records, declared that "important records were delayed and executive time was devoted to dealing with the crisis."[33] This undisputed statement supports an actual disruption of the relationship

between his client a nd the other contracting party, Death Row Records, as well as a claim for damages. Therefore, Defendants had probable cause to file a claim against Tucker for intentional interference with a contractual relationship.

B. Probable cause for intentional interference with prospective business advantage

Intentional interference with prospective business advantage differs from intentional interference with contractual relationship in that it does not require an actual and existing contract.[34] Rather, this tort protects "against intentional acts designed to harm an economic relationship which is likely to produce economic benefit."[35] The elements for this tort are: 1) Plaintiffs "had an economic relationship with a third party containing the probability of a future economic benefit; 2) defendant had knowledge of this relationship; 3) defendant committed intentional and unjustified acts designed to disrupt the relationship; 4) actual disruption of the relationship; and 5) resulting damages."[36]

The first three elements of this tort are supported by probable cause for the reasons stated above. Additionally, because this tart does not require an actual breach of the contract but just an "actual disruption," the fourth and fifth elements are also supported by probable cause, a indicated in the Field declaration.fn37 Thus, Defendants had probable cause to file a claim for intentional interference with prospective economic advantage against Plaintiff Tucker.

C. Probable cause for unfair business practices and unfair competition

California Business & Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." The California Supreme Court in Farmers Ins. Exchange v. Superior Court stated that "in essence, an action based on... section 17200 to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [this] section.[38]

The business activity at issue here is the record distribution deal that Plaintiff was trying to co-opt from Interscope to Time Warner as evidenced by the letter agreement presented by Plaintiff to Suge Knight. The violations of other laws described above provides the probable cause for both intentional interference with contractual relationship and with prospective business advantage. Thus, Defendants had probable cause to assert a claim for unfair business practices and unfair competition.

Claims Prosecuted by Thomas

D. Probable cause for inducement to breach contract

A claim for inducement to breach a contract requires: 1) a valid contract; 2) Defendant knew of this contract and intended to induce its breach; 3) that "the contract was in fact breached resulting in injury to plaintiff;" and 4) the resulting injury were "proximately caused by

Defendant's unjustified or wrongful conduct."[39] The court finds that genuine issues of fact exist regarding the existence of probable cause on Defendant Thomas' claim against Mrs. Tucker for inducement to breach a contract. Accordingly, summary judgment is not warranted on this issue.

E. Probable cause for inducement to breach fiduciary duty

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach."[40] The court finds that genuine issues of fact exist regarding the existence of probable cause on Defendant Thomas' claim against Mrs. Tucker for inducement to breach fiduciary duty. Accordingly, summary judgment is not warranted on this issue.

Claims Prosecuted by Kenner

F. Probable cause for RICO violations

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), it is unlawful for any person associated with any enterprise, the activities of which affect interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.[41] The types of racketeering activity that will support a RICO claim are listed in 18 U.S.C. §1962 and extortion is listed as such an activity.[42] Extortion is defined as "the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under

color of official right."[43] Furthermore, threatening to accuse an individual of a crime can create a fear that underlies extortion.[44] California Penal Code § 528 states that:

> Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in [§519] is punishable in the same manner as if such money or property were actually obtained by means of such threat.

At the outset, there is no dispute that a contract right qualifies as property to support an extortion claim. Furthermore, Mr. Kenner, Death Row's attorney, testified that he believed Mrs. Tucker had threatened Mr. Knight that she would seek criminal prosecution against him and Death Row if they did not leave Interscope and contract with Time Warner.[45] Thereafter, Mrs. Tucker presented the August 7, 1995 letter for Mr. Knight's signature implying that failure to sign would result in her taking the threatened actions. Mr. Kenner testified in his deposition that Mrs. Tucker threatened, explicitly and/or implicitly, that she would seek the initiation of criminal proceedings against Mr. Knight unless he agreed to her demands.[46] Furthermore, Mrs. Tucker admitted that she contacted the Justice Department and the FBI regarding Death Row lending further support to her threats.[47] Finally, the August 7, 1995 letter, prepared at Mrs. Tucker's direction for Knight's signature was sufficient to imply the same threats - that Mrs. Tucker would seek criminal prosecution of Mr. Knight-and Death Row if

Mr. Knight did not sign the letter agreement. The foregoing is sufficient to find probable cause to assert a claim for RICO violations against Mrs. Tucker.

G. Probable cause for extortion

As discussed above in the RICO analysis, there is sufficient evidence to support the substantive extortion claim. As such, Defendant Kenner had probable cause to bring the extortion claim.

H. Probable cause for Abuse of Process

"The tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed."[48] "The essence of the tort is misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice."[49] The court finds that genuine issues of fact exist as to whether Defendant Kenner had probable cause to assert a claim against Mrs. Tucker for abuse of process.

3. Malice

In order to satisfy the malice element in a malicious prosecution action, the plaintiff has to demonstrate "either actual hostility or ill will on the part of the [plaintiffs in the underlying litigation] or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant."[50] Malice cannot be imputed to attorneys.[51] Instead, a plaintiff must show that the attorney in the underlying action "maliciously pursu[ed] an objectively untenable claim.[52] At the outset, when

the facts are in dispute, malice must be left to the jury to decide.[53] However, summary judgment is appropriate where a plaintiff fails to produce sufficient evidence to show malice.[54]

Defendant Thomas asserts that Plaintiffs have failed to produce any evidence demonstrating that he acted with malice in pursuing the underlying lawsuit.[55] Instead, Defendant Thomas notes that Mrs. Tucker stated in her deposition that she "believe[d] [Interscope and its attorneys] are honorable men," but that "they were pursuing [the litigation] like they really believed it."[56]

Plaintiffs assert that Mrs. Tucker's personal opinion as to whether Defendant Thomas acted with malice is irrelevant,[57] Moreover, Plaintiffs contend that Defendant Thomas cannot deny he acted with malice because he relied on the attorney client privilege as a basis for withholding discovery related to the filing of the underlying complaint which Plaintiffs believe would have shown malice had they been obtained.[58] The court agrees with Plaintiffs that the personal beliefs of Mrs. Tucker have no bearing on whether Defendant Thomas acted with malice. However, as noted by the Ninth Circuit, Plaintiffs cannot rely on new objections to prior discovery rulings as a basis for opposing Defendants' motion. Accordingly, summary judgment is warranted as to Plaintiffs' malicious prosecution claim against Defendant Thomas because Plaintiffs have failed to produce any evidence to show that Defendant acted with malice.

4. Loss of Consortium Damages[59]

Plaintiffs also claimed that Mr. Tucker suffered loss of

consortium from the tortious acts committed upon his spouse. Loss of consortium refers to "the right of one spouse to state a cause of action for loss of companionship, emotional support, love, felicity and sexual relations caused by a negligent or intentional injury to the other spouse by a third party.[60] Recovery for loss of consortium is possible for a spouse's psychological injuries where the injured "spouse suffers a traumatically induced neurosis, psychosis, chronic depression, or phobia" which "grievously injure[s]" the marriage for an extended period of time.fn61 Recovery is not available, however, for a spouse who merely suffers "loss of society, companionship and support" or where the relationship is only "superficially or temporarily impaired" as a result of the spouse's injuries,[62]

Although the Ninth Circuit has found evidence that Mrs. Tucker suffered significant emotional distress, Mr. Tucker fails to carry his burden of production on his loss of consortium claim. While it is clear that the underlying litigation took a tall on Plaintiffs' marriage, the injuries suffered by Ms. Tucker did not grievously injure their marriage to the extent that Mr. Tucker was denied companionship, emotional support, love, and felicity. Instead, Mr. Tucker's deposition states that his marriage suffered because the stress of the underlying litigation made it difficult to spend "leisurely time" with his wife.fn63 Specifically, when questioned about the effects Mrs. Tucker's injuries have had on their marriage, Mr. Tucker appeared most aggrieved by the fact that he is no longer able to enjoy a cup of coffee in the morning with his wife and refuses to allow her to make him coffee in the morning (despite her offers to do so) because he believes she needs to rest as much as

possible.fn64 His claim finds even less support in Mrs. Tuckers deposition testimony that the underlying litigation did not cause problems in their relationship "except that it wears you out" and rude it difficult to "just relax and have a normal life."[65]

Although it is unfortunate that Plaintiffs' marriage suffered from the stress of the underlying litigation, Plaintiffs' testimony demonstrates that the harm caused to their marriage by Mrs. Tucker's injuries is more akin to a loss of society and companionship than the type of longstanding and debilitating impairment to the relationship necessary to support a loss of consortium claim. Thus, Plaintiffs' averment that loss of consortium should be decided by the jury puts the cart before the horse where, as here, there is no triable issue of material fact for the jury to decide.[66] Accordingly, summary judgment is warranted on this issue.

Unclean Hands

Defendants also seek summary judgment on the grounds that Plaintiffs' claims are barred by the doctrine of unclean hands. The unclean hands defense applies in malicious prosecution actions and bars the plaintiff from relief if the plaintiff "has engaged in any unconscientious conduct directly related to the transaction or matter before the court."[67] The court finds that genuine issues of fact exist on Defendants' unclean hands defense which preclude summary judgment.

Conclusion

For the above stated reasons, the court finds that

genuine issues of material fact remain as to:

(1) the favorable termination element of Plaintiffs' malicious prosecution claim;
(2) the lack of probable cause element of Plaintiffs' malicious prosecution claim with respect to the claims asserted by Defendant Thomas for inducement to breach contract and inducement to breach fiduciary duty and by Defendant Kennerfor abuse of process; and
(3) the defense of unclean hands

The court further finds that Defendants have established as a matter of law that they had probable cause to negate Plaintiffs' claims for malicious prosecution with respect to;

(1) Defendant Kenner and Thomas' claims for intentional interference with a contractual relationship; intentional interference with prospective business.,- advantage; and unfair business practices and unfair competition;
(2) Defendant Kenner's RICO and extortion claims.

The court also finds that Defendant Thomas has established as a matter of law that Plaintiffs cannot show malice as to Defendant Thomas. Lastly, the court finds that Defendants have established as a matter of law that Mr. Tucker cannot prevail on his claim for damages for loss of consortium.

Footnotes

[1] 85 Fed. Appx. 610, 512- 613 (2004),
[2] The following facts are uncontroverted and the court, therefore, finds such facts established as a matter of

law.

[3] See Ted Field Decl. at Par. 2

[4] See Plaintiffs Complaint at Par. 7.

[5]See Def. Ex at 19:19-21; Def. Ex. I at 54:19-21.

[6]See Def. Ex. A at Par.12; Def. Ex. DD at 170:29-171:14.

[7]See Def. Ex. P at 57:22- 70:8; Def. Ex. H at 299:22-291:15.

[8]See Ex. B to Plaintiffs' Opposition to Motion for Summary Judgment.

[9] See Plaintiffs' Complaint at Par. 16.

[10] Complaint, CV 95-5444-RMT.

[11] Complaint, CV 95-5503-RMT.

[12] See Def. Ex. AA; Def. Ex. V.

[13] Id.

[14] See Def. Ex. Y & Z.

[15]Plaintiffs' Complaint.

[16]Def. Ex. E.

[17]F. R. C. P. Rule 55(c):

[18]Celotex v. Catrett, 477 U.S. 317, 325 (1986).

[19] Id.

[20] Id. at 822.

[21] Matsushita Elec. Indus. Co. v._Zenith Radio Corp., 475 U.S. 574, 588 (1980).

[22] Anderson v., Liberty Lobby, inc., 477 U.S. 242, 252 (1985) ("[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient").

[23] Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1028, 1031 (9th Cir., 2001).

[24] The court declines to rule on Defendants' objections to Plaintiffs' evidence offered in support of their opposition because it finds that the evidence offered by Plaintiffs, regardless of whether it is admitted, is insufficient to raise a genuine issue.

[25] Sierra Club Foundation v. Graham, 72 Cal. App. 4th 1135, 1147 (1999).

[26] Zamos v. Stroud, 32 Cal. 4th 958, 950 (2005).

[27] See vvillams v. Coombs,179 Cal. App. 3d 626, 631 (1986). As noted above, the Ninth Circuit ruled that Plaintiffs presented sufficient evidence to show that Mrs. Tucker suffered damages as a result of the underlying litigation. Accordingly, this order addresses the first three elements Plaintiffs must prove in order to succeed on their malicious prosecution claim as well as Mr. Tucker's damages for loss of consortium.

[28] Sierra Club Foundation, 72 Cal. App, 4th at 1149.

[29] See Roberts v. Sentry, 76 Cal. App. 4th 375, 382 (1999).

[30] See Weber v. Leuschner, 240 Cal, App. 2d 820, 830 (1966).

[31] Roberts, 76 Cal. App. 4th at 382.

[32] Bhamblin v. Berge 166 Cal. App. 3rd 118,123 (1085).

[33] Field Decl., Par.5.

[34]Shamblin,155 Cal. App. 3d at 123.

[35] Id.

[36] Id.

[37] See Ted Fields Decl. Par. 5 ("important records were delayed and executive time was devoted to dealing with the crisis").

[38] 2 Cal. 4th 377, 383 (1992)(internal quotations omitted).

[39] See Freed v. Manchester Service Inc.,165 Cal. App. 2d 180,189(1958).

[40] City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, 68 Cal. App. 4th 445, 483(1998).

[41] See 18 U.S.C. § 1962(c).

[42] See 18 U.S.C. §1961.

[43] Cal. Penal Code §518.

[44] See Cal. Penal Code §519(2).

[45] See Def. Ex. P at 48:2-15; 66:3-67:3; 103:14-107:12.

[46] See Def. Ex. P at 48:2-15; 66:3-67:3; 103:14-107:12.

[47] 476 See Def. Ex. HH at 453:10-456:4.

[48] Brown v. Kennard 94 Cal. App. 4th 40, 44 (Cal. Ct. App. 2002).

[49] Id. (Internal quotations omitted).

[50] Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478, 498-9 (1998).

[51]Rogers v. Peinado, 86 Cal. App. 4th 1, 7 (overruled on other grounds).

[52] Id.

[53] See Weaver v. Superior Court, 96 Cal. App. 8d 166,188 (1979).

[54]Gomez v. Garcia,112 Cal. App. 8d 892 (1980).

[55] Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment Based on Existence of Probable Cause and Lack of Malice at 21.

[56] Def. Ex. H at 97:14-18.

[57] Plaintiffs' Response to Def. Stmnt. of Uncontroverted Facts and Conclusions of Law at Par. 38.

[58] Id.

[59] This court previously ruled that summary judgment was warranted on Mr. Tucker's loss of consortium claim as a result of its finding that there was no evidence Mrs. Tucker suffered damages. The Ninth Circuit's reversal of that finding, however, requires this court to consider Defendants' motion challenging the loss of consortium claim.

[60] Anderson v. Northrop Corp., 203 Cal. App, 3d 772, 780 (1988)(internal quotations omitted).

[61] Molien v. Kaiser Found. Hosps., 27 Cal. 3d 910, 983 (1980); Anderson, 203 Cal. App, 3d at 780.

[62] Anderson, 203 Cal. App. 3d at 780 (Affirming the dismissal of a plaintiffs claim far loss of consortium based on the "lass of society, companionship and support" of her husband after he was wrongfully discharged from his job and became "mentally upset, distressed and aggravated').

[63] Def. Ex. LL at 188:21.

[64] Def. Ex. LL at 136;7-143:14.

[65]See Def. Ex. H at 280:4-18,

[66] Anderson v. Liberty Lobby Inc., 477 U.S. at 252 ("[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to survive a motion for summary judgment).

[67] De Rosa v. Transamerica Title Ins. Co., 213 Cal. App. 3d 1390, 1395 (1989),

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF C. DELORES TUCKER, by and through William Tucker as PERSONAL REPRESENTATIVE; and WILLIAM TUCKER individually,

Plaintiffs-Appellants,

v.

INTERSCOPE RECORDS, INC.; DEATH ROW RECORDS, INC.; CHARLES B. ORTNER; PAUL, HASTINGS, JANOFSKY & WALKER, LLP,

Defendants-Appellees.

ESTATE OF C. DELORES TUCKER, by and through William Tucker as PERSONAL REPRESENTATIVE; and WILLIAM TUCKER individually,

Plaintiffs-Appellants,

v.

DAVID KENNER; GEOFFREY THOMAS; JACK PALADINO; PAUL PALADINO, Defendants-Appellees.

ORDER

Before: NOONAN, PAEZ, TALLMAN, Circuit Judges

Judges Paez and Tallman have voted to deny the petition for rehearing en banc. Judge Noonan recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.